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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-5903

H____L____, on behalf of herself and all others similarly situated,

Plaintiff and Appellant,

v.

Honorable Scott M. Matheson, individually and in his capacity as Governor of the State of Utah, and Honorable Robert B. Hansen, individually and in his capacity as Attorney General of the State of Utah,

Defendants and Respondents.

On Appeal From the Supreme Court of the State of Utah

JURISDICTIONAL STATEMENT or in the alternative PETITION FOR WRIT OF CERTIORARI

DAVID S. DOLOWITZ
of and for
PARSONS, BEHLE & LATIMER
79 South State Street
P. O. Box 11898
Salt Lake City, Utah 84147
Telephone: 532-1234

Counsel of Record,
Attorney for
Appellant-Petitioner

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OPINIONS BELOW

Appellant filed the instant action challenging the constitutional validity of Section 76-7-304(2) Utah Code Annotated, 1953, on behalf of herself and all others similarly situated, after she was informed by her physician that she was pregnant, that in his best medical judgment it would be appropriate to perform an abortion upon her, that the physician, a social worker and the appellant determined that it would be in

the appellant's best interest not to notify appellant's parents of that decision or the proposed abortion because it would be contrary to his best medical judgment and her best interests but that under the provisions of Section 76-7-304(2) Utah Code Annotated, 1953, he faced criminal sanctions if he proceeded to perform the abortion upon her without providing that notification and was, therefore, unwilling to perform an abortion upon the appellant without providing notice to her parents.

The trial court determined that the phrase "if possible" in Section 76-7-304(2) Utah Code Annotated, 1953, meant if physically possible and ruled that the statute as thus construed did not violate the Constitution of the United States. This decision was appealed to the Supreme Court of the State of Utah which determined that the Trial Court was correct in its interpretation of the language "if possible" and that as thus construed, the Utah Statute was not in violation of the Constitution of the United States as asserted by appellant. (Appendix A)

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The Opinion of the Supreme Court of the State of Utah was published on December 6, 1979, (Appendix A). A Notice of Appeal to this Court, (Appendix B) was filed on the 26th day of December, 1979.

This appeal is taken pursuant to the provisions of subsections (2) and/or (3) of Section 1257, Title 28, U.S.C. as the decisions of the Third Judicial District Court in and for Salt Lake County, State of Utah and the Supreme Court of the State of Utah construing and upholding against the challenge of the appellant the provisions of Section 76-7-304(2) Utah Code Annotated, 1953, are in error. Said statute, as thus construed,

violates the Fourteenth Amendment to the Constitution of the United States by effectuating an illegal regulation of and infringement upon the exercise of the right of privacy of the plaintiff and all members of the class which she represents by unduly restricting their right to secure an abortion and a doctor-patient relationship through the imposition of criminal sanctions against a physician who performs an abortion upon such a minor without notifying her parents even if he determines that such action is contrary to his best medical judgment.

Cases in support of this jurisdiction are: Bellotti v. Baird, ____ U.S. ____ 61 L.Ed.2d 797, 99 So. Ct. 3035 (July 2, 1979); Colautti v. Franklin, 439 U.S. 379 (1979); Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973).

QUESTION PRESENTED

DO THE PROVISIONS OF SECTION 76-7-304(2) UTAH CODE ANNOTATED, 1953, WHICH REQUIRE BY THE IMPOSITION OF CRIMINAL SANCTIONS, A PHYSICIAN IN THE STATE OF UTAH, PRIOR TO PERFORMING AN ABORTION ON A MINOR, REGARDLESS OF THE TRIMESTER OF THE MINOR'S PREGNANCY, TO NOTIFY, IF PHYSICALLY POSSIBLE, HER PARENTS, WHEN IT IS DETERMINED BY THE MINOR AND HER TREATING PHYSICIAN TO BE IN HER BEST MEDICAL INTEREST THAT THEY NOT BE SO INFORMED, VIOLATE THE RIGHT OF PRIVACY OF THAT MINOR WHICH RIGHT ENCOMPASSES HER RIGHT TO SECURE AN ABORTION WITHOUT UNDUE INTERFERENCE BY THE STATE AND VIOLATE HER RIGHT TO A DOCTOR-PATIENT RELATIONSHIP FREE OF UNDUE REGULATION BY THE STATE IN CONTRAVENTION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

1. Section 1, Fourteenth Amendment to the Constitution of

the United States of America:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Section 76-7-304(2) Utah Code Annotated 1953:

> "To enable the physician to exercise his best medical judgment, he shall: . . . (2) notify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed if she is a minor or the husband of the woman, if she is married."

3. Section 76-7-314(3) Utah Code Annotated, 1953:

> "A violation of any other provision in this act [part] is a class A misdemeanor."

4. Section 76-3-204(1) Utah Code Annotated, 1953:

> "A person who has been convicted of a misdemeanor may be sentenced to imprisonment as follows: (1) In the case of a Class A misdemeanor, for a term not exceeding one year; . . .

5. Section 76-3-301(3) Utah Code Annotated, 1953:

> "A person who has been convicted of an offense may be sentenced to pay a fine not exceeding: . . . (3) $1,000 when the conviction is of a class A misdemeanor; . . .

STATEMENT OF THE CASE

Appellant is a minor who determined that she was in her first trimester of an undesired pregnancy when she filed the complaint in this action. She had consulted with her physician prior to instituting the action and determined that it was in her best medical interest that she be aborted. Her physician and the social worker with whom she consulted confirmed appellant's

opinion that it was in her best medical interests that her parents not be notified either of her decision or of its implementation.[1] However, the physician then advised her that he was unwilling to perform the abortion without notifying her parents because of the provisions of Section 76-7-304(2) Utah Code Annotated, 1953, which made it possible that he would be criminally punished for doing so.

The Trial Court ruled, as the physician believed, that the phrase "if possible" meant if physically possible and that as thus construed, the statute was constitionally valid. This ruling was upheld by the Supreme Court of the State of Utah, which examined the decision of this Court in Bellotti v. Baird, ____ U.S. ____ 61 L.Ed.2d 797, 99 So. Ct. 3035 (1979) and determined that the Statute as thus construed was Constitutionally acceptable. (Appendix A) That decision is not correct and this Court must correct that error. Women's Community Health Center, Inc. v. Cohen, 477 F. Supp. 542, 546-548 (D.Maine, 1979)

This Court stated in Roe v. Wade, 410 U.S. 113 (1973) that simplistic characterizations and solutions in abortion cases have to be avoided as there is a very sensitive balance of interests involved. These interests were carefully examined in Roe v. Wade, supra, Doe v. Bolton, 410 U.S. 179 (1973), Colautti v. Franklin, 439 U.S. 379 (1979) and Bellotti v. Baird, supra, in which the sensitive balance regarding a minor was articulated. ____ U.S. at ____ (slip opinion pages 10-23).

In Roe v. Wade, supra, this Court declared the constitutional rule that:

[1] The Utah Supreme Court stated the Trial Court made the finding that appellant made no showing of special detriment if her parents were not notified (Appendix A, P.2,) but this is not correct. Examination of the trial transcript reveals that once the Trial Court determined that the only factual question to be considered was whether or not it was physically possible to contact appellant's parents, all other facts including inquiry into the special circumstances of the appellant were irrelevant. (Trial Transcript pages 8-20)

> This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. 410 U.S. at 153 (1973).

In Wade, 410 U.S. at 512, and repeatedly since then (Zablocki v. Redhail, 434 U.S. 374, 385 (1978); Maher v. Roe, 432 U.S. 464, 471 (1977); Colautti v. Franklin, 439 U.S. 379, 58 L. Ed. 2d 596, 99 S. Ct. 675, 681 (1971); this Court has characterized this privacy interest "fundamental." This characterization has special significance in the Fourteenth Amendment jurisprudence.

> Where certain 'fundamental rights' are involved, . . . regulation limiting those rights may be justified only by 'compelling state interest' . . . and . . . legislative enactments must be narrowly drawn to express only the legitimate interests at stake. Roe vs. Wade, 410 U.S. at 155.

In conjunction with this fundamental right of the Appellant is the woman's right to consult with and secure treatment from a physician to protect her health, Doe v. Bolton, 410 U.S. 179 (1973), Colautti v. Franklin, supra. Constitutional examination of any statute regulating exercise of that right must be close and careful to see that the regulation takes into account the constitutionally protected interests of the pregnant woman whether they are asserted by the woman herself in attacking the statute or by the State in justification of limitations established by the challenged statute. In Bellotti v. Baird, supra, this Court pointed out that this problem is greater for a pregnant minor than an adult and

> " . . . there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible" ____ U.S. at ____ (slip opinion page 19).

This is made more critical in the instant action where the challenged statute imposes criminal sanctions against the treating physician if he violates the statute.

Finally, it must be noted that the States have specifically been ordered not to regulate first trimester abortion by feigning an interest in a woman's health, particularly since the interest in potential life is insignificant at this time. Roe v. Wade, 410 U.S. at 163, 164. The challenged statute effectuated precisely such a regulation in the instant matter.

All of these considerations and the special concerns presented by the case of a pregnant minor were carefully analyzed and balanced by this Court in its decision of Bellotti vs. Baird, supra. The rationale and rulings of this Court contained in that opinion were deliberately rejected by the Utah Supreme Court. Although the challenged statute requires a physician to notify the parents of a minor, even in the circumstances where he and her counselor determined such notification was inappropriate, (Appendix A, pages 3, 9-10) and this is effectuated regardless of the trimester of pregnancy, the Utah Supreme Court, examined the line of authority from Roe v. Wade, supra, to Bellotti v. Baird, supra, and stated:

> From the foregoing one cannot discern a clear constitutional doctrine inhibiting the State from enacting a statute, such as, Section 76-7-304(2), which merely provides for a notification, if possible, of the parents of a minor contemplating an abortion. (Appendix A at page 8)

In reaching this ruling, the Utah Supreme Court evaluated the statute requiring parental notification in light of the constitutional challenges presented in this appeal and rejected them. (Appendix A, pages 2-3) In justifying its decision, the Court stated that only four Justices of this Court concurred in the opinion of the Court in Bellotti v. Baird, supra, and thus they could reach the decision articulated.[2] (Appendix A, page 7)

[2] Four additional Justices of this Court concurred in the judgment based on their determination that the Massachusetts statute as interpreted by the Massachusetts' Supreme Court under challenge in Bellotti v. Baird, supra, was contrary to the ruling in Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976). The issue discussed in the Court's Opinion and not reached by those four Justices is now presented in this appeal.

In doing this the Utah Courts rejected the specific ruling of this Court as articulated in Baird ____ U.S. ____, ____ (slip opinion pages 22-25, 27-28) that where the Massachusetts statute had been construed to require notice to be given to every parent, if possible, ____ U.S. ____, ____ (slip opinion page 23), it enacted a statute which ". . . would impose an undue burden upon the exercise by minors of the right to seek an abortion." ____ U.S. ____, ____ (slip opinion page 24).

Another differential asserted by the respondents to the Utah Supreme Court to distinguish the instant matter from Bellotti v. Baird, supra, is that in Bellotti the statute under challenge required the Courts of the State of Massachusetts to make a determination as to whether or not an abortion was in the best interest of a minor and in such a proceeding were required to notify the parents of the action. The Utah Statute presents the question not of a Court's taking such action, but the treating physician. The statute, under threat of criminal prosecution requires the physician to ignore all of those factors which this Court has stated he must consider without interference by the State in Doe v. Bolton, supra., Colautti v. Franklin, supra, and notify his patient's parents if he may physically do so. The statute not only effectuates this improper regulation, it imposes criminal sanctions on the physician if he acts on his constitutionally protected judgment.

The Utah Supreme Court rejected this rationale despite the specific ruling of this Court that:

> "Although it satisfies constitutional standards in large part, §125 falls short of them in two respects:
>
> ***
>
> "Second, it requires parental consultation or notification in every instance, without affording the pregnant minor an opportunity

to receive an independent judicial determination that she is mature enough to consent or that an abortion would be in her best interest." ____ U.S. at ____, ____ (slip opinion pages 27-28)

The Utah Courts also rejected an interpretation of the Statute which would have made it Constitutionally acceptable, that is, to interpret the language "if possible" to mean if possible in terms of the best interest of the child in light of the medical, social, psychological and physical factors discerned by the treating physician in examining the minor. (Appendix A pages 9-10.)[3] In the clash of rights and interests, Section 76-7-304(2), Utah Code Annotated, 1953, as construed by the Courts of Utah, establishes an over-broad regulation of the right to privacy in Utah and it must be declared constitutionally invalid. Women's Community Health Center, Inc. v. Cohen, supra.

CONCLUSION

This Court should on appeal, or upon granting of a Writ of Certiorari, reverse the decisions of the Courts of the State of Utah and declare the provisions of Secton 76-7-304(2) Utah Code Annotated, 1953, as construed by the Courts of the State of Utah, to be in contravention to the Fourteenth Amendment to the Constitution of the United States.

Respectfully Submitted,

DAVID S. DOLOWITZ
Counsel of Record,
Attorney for Appellant-Petitioner

[3] The other portion of this provision which requires notification by the physician of the husband of a married woman is also constitutionally invalid. Scheinberg v. Smith ____ F. Supp. ____ (S.D. Fla. 1979); Doe v. Deschamps, 461 F.Supp. 682 (D.Mont. 1976), see Roe v. Rampton, 394 F.Supp. 677 at 684 (D.Utah 1976), aff'd, 535 F.2d 1219 (10th Cir. 1976).

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF UTAH

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H___L___, on behalf of herself and all others similarly situated,
Plaintiff and Appellant,

v.

Honorable Scott M. Matheson, individually and in his capacity as Governor of the State of Utah, and Honorable Robert B. Hansen, individually and in his capacity as Attorney General of the State of Utah,
Defendants and Respondents.

No. 16249

F I L E D

December 6, 1979

Geoffrey J. Butler, Clerk

MAUGHAN, Justice:

Plaintiff, seeking declaratory and injunctive relief, initiated this action for the purpose of having Section 76-7-304(2) declared unconstitutional and to enjoin the enforcement thereof. The trial court found the provision constitutionally valid, and plaintiff appeals therefrom. The judgment is affirmed. All statutory references are to the 1953 Utah Code Annotated, as amended.

Plaintiff, a fifteen year old girl, alleged she was pregnant with an unwanted child. She asserted she was in her first trimester of pregnancy. She claimed she did not wish to inform her parents of her condition, and she believed it to be in her best interests not to impart such information to her parents. She averred, she was determined to secure an abortion after consultation with her counselor.

Plaintiff consulted her physician. He advised her, under Section 76-7-304(2), he could not and would not perform the abortion, without first notifying her parents.

Section 76-7-304, provides:

> To enable the physician to exercise his best medical judgment, he shall:
>
> (1) Consider all factors relevant to the well-being of the woman upon whom the abortion is to be performed including, but not limited to,

(a) Her physical, emotional and psychological health and safety,

(b) Her age,

(c) Her familial situation.

(2) Notify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed, if she is a minor or the husband of the woman, if she is married.

This provision is part of the criminal code, as provided in Section 76-7-314(3). Such may be punishable by imprisonment for a term not exceeding one year, as provided in Section 76-3-204(1); together with a fine not exceeding $1,000, pursuant to Section 76-3-301(3).

Plaintiff proceeded in a class action, asserting the statute constituted an invasion of privacy of each member of the class, whom she represented. Specifically, she claimed the right of privacy encompassed the right to have an abortion, particularly in the first trimester of pregnancy, free from regulation or interference by the State of Utah. She urged the statute unconstitutionally infringed the right of privacy and thus violated the Fourteenth Amendment of the Constitution of the United States. She further asserted the statute was an overly broad regulation, which interfered with her right to consult freely with her treating physician, and to secure treatment, where appropriate, in the effectuation of an abortion without any compelling State interest in such regulation.

In its order denying a temporary restraining order, the trial court found plaintiff had made no special showing of detriment which might result if her parents were notified except for plaintiff's allegations she did not wish to inform her parents, and believed it was in her best interests to withhold this information. The trial court further found the identity of the parents was known or could be easily ascertained by the consulting physician. The trial court concluded, while a State may not regulate or interfere with the decision of an adult woman, and that of her physician, to terminate an unwanted pregnancy during the first trimester, there was no binding decision, which precluded a State from enacting a legislative provision requiring a physician to notify the parents of a minor prior to performing an abortion.

The trial court entered a judgment, dismissing plaintiff's action. The trial court found plaintiff was

unmarried, fifteen years of age, resided at home, was a dependent of her parents, and was in the first trimester of her pregnancy at the time her complaint was filed. The Court further ruled plaintiff was an appropriate representative to represent the class she purported to represent. The trial court interpreted Section 76-7-304(2) as requiring the treating physician to notify, if it be physically possible, viz., if he knows or can determine the identity of the parents of a minor, and he is physically able to notify them, that he do so prior to the performance of an abortion upon a minor. The trial court ruled, as thus interpreted, the statute was valid and did not unconstitutionally restrict the right of privacy of a minor to secure an abortion, or to enter into a doctor-patient relationship.

On appeal, plaintiff contends Section 76-7-304(2), as interpreted by the trial court, violates the Fourteenth Amendment of the Constitution of the United States. She urges, in the first trimester, the State cannot interfere at all with the fundamental interest of the pregnant woman in making an abortion decision in consultation with her physician. In the alternative, plaintiff contends this overly-broad regulation of the exercise of constitutionally protected rights can be so construed as to be valid. Specifically, plaintiff urges the term "if possible" be interpreted as conferring on the physician and patient the discretion to determine if medically, socially, psychologically, and physically it would be appropriate to notify the minor's parents.

In Roe v. Wade[1] the Court ruled the right of privacy, found in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, is broad enough to encompass a woman's decision as to whether to terminate her pregnancy. This right of personal privacy, including the abortion decision is not unqualified and must be considered against state interests in regulation. However, a regulation limiting a fundamental right may be justified only by a compelling state interest. Furthermore, such legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.

The Court ruled in Roe v. Wade,[2] with respect to the stage prior to approximately the end of the first trimester, "The attending physician, in consultation with his patient, is free to determine, without regulation by the State, that in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State."

It further held the State may place increasing restrictions on abortion as the period of pregnancy lengthens,

1. 410 U.S. 113, 153.
2. 410 U.S. 163.

so long as those restrictions are tailored to the recognized state interests. The Court stated:

> . . . The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician. If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra professional are available.[3]

In the companion case of Doe v. Bolton[4] the Court ruled the abortion determination, so far as the physician is concerned, is made in the exercise of his best clinical judgment in the light of all the attendant circumstances. The physician may range farther afield wherever his medical judgment, properly and professionally exercised, so dictates and directs him. His "medical judgment may be exercised in the light of all factors physical, emotional, psychological, familial, and the woman's age - relevant to the well-being of the patient. All these factors relate to health. This allows the attending physician the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman."

The aforecited factors, which the physician may consider in making his best medical judgment were incorporated in subsection (1) of Section 76-7-304, the challenged statute. The notification provision of subsection (2) is substantially and logically related to the factors in subsection (1), for it is the parent of the minor, who would frequently possess additional information, which might prove invaluable to the physician in exercising his "best medical judgment." The notification provision merely gives the parents the option to respond and to consult with the physician and child. The statute does not confer a veto-power on anyone to overrule the determination of the doctor and his patient.[5]

Neither the Roe nor the Doe decision considered the issue of a pregnant minor seeking an abortion. In Planned Parenthood of Central Missouri v. Danforth[6] the

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3. 410 U.S. 165-166.
4. 410 U.S. 179, 191-192 (1972).
5. The issue of parental consent for a surgical procedure on a minor child has not been presented to the court and will not be discussed.
6. 428 U.S. 52, 74-75 (1976).

Court ruled the State may not impose a blanket provision, requiring the consent of a parent or person in loco parentis as a condition for abortion of an unmarried minor during the first twelve weeks of her pregnancy. The Court explained the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary veto over the decision of the physician and his patient, to terminate the patient's pregnancy, regardless of the reason for withholding the consent.

The Court stated:

> Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights. [Citations] The Court indeed, however, long has recognized that the State has somewhat broader authority to regulate the activities of children than of adults. [Citations] It remains, then, to examine whether there is any significant state interest in conditioning an abortion on the consent of a parent or person in loco parentis that is not present in the case of an adult.

It was urged before the court the State had a substantial interest in safeguarding the family unit and parental authority. The court responded it could not conclude conferring a veto power on the parent would strengthen the family unit or enhance parental authority and control where the minor and nonconsenting parent were so fundamentally in conflict, and the existence of the pregnancy already had fractured the family structure.

> Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant.

The Court did qualify its holding by stating it had not suggested every minor, regardless of age or maturity, might give effective consent for termination of her pregnancy. The fault of the challenged Missouri statute was it imposed a special consent provision, exercisable by a person other than the woman and her physician, as a prerequisite to a minor's termination of her pregnancy; and did so without a sufficient justification for the restriction, thus violating the strictures of Roe and Doe.

In Carey v. Population Services International[7] the Court cited Planned Parenthood and stated the right to privacy in connection with decisions affecting procreation extends to minors as well as to adults. The Court reiterated the standard, that State restrictions inhibiting privacy rights of minors are valid only if they serve a significant state interest, which is not present in the case of an adult.

The concurring opinion of Justice Powell in Carey is of particular significance in an attempt to understand his opinion in the Court's most recent decision concerning a minor's right to an abortion, Bellotti v. Baird.[8] In Carey, he said:

> Requiring minors to seek parental guidance would be consistent with our prior cases. In Planned Parenthood, we considered whether there was 'any significant state interest in conditioning [a minor's] abortion [decision] on the consent of a parent or person in loco parentis that is not present in the case of an adult.' [Citation] Observing that the minor necessarily would be consulting with a physician on all aspects of the abortion decision, we concluded that the Missouri requirement was invalid because it imposed 'a special consent provision, exercisable by a person other than the woman and her physician, as a prerequisite to a minor's termination of her pregnancy and [did] so without a sufficient justification for the restriction.' Ibid. But we explicitly suggested that a materially different constitutional issue would be presented with respect to a statute assuring in most instances consultation between the parent and child. [Citations]
>
> A requirement of prior parental consultation is merely one illustration of permissible regulation in this area. . . .[9]

In Bellotti v. Baird[10] the issues of consent and notification, where a minor desired an abortion, were inextricably intertwined. However, there is language in the main opinion which would appear to hold unconstitutional a statu-

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7. 431 U.S. 678, 693 (1977).
8. ___ U.S. ___, 61 L.Ed.2d 797, 99 S.Ct. 3035, July 2, 1979.
9. 431 U.S. 709-710.
10. note 8, supra.

tory provision requiring parental consultation or notification in every instance, without affording the pregnant minor an opportunity to receive an independent judicial determination that she is mature enough to consent or that an abortion would be in her best interests.[11]

Under the challenged statutory scheme in Bellotti, all minors were required to obtain the consent of both parents or in the alternative the consent of the court prior to procuring an abortion. If the minor elected to seek court consent, there was a mandatory notification of the parents of the pending court action. It was within this context Justice Powell ruled the blanket notification requirement unconstitutional. Significantly, a majority of the court refused to join in Justice Powell's opinion. Justice White dissented, and three Justices joined in the opinion of Justice Stevens, concurring in the judgment.

Justice Stevens stated:

> In short, it seems to me that this case is governed by Danforth; to the extent this statute differs from that in Danforth, it is potentially even more restrictive of the constitutional right to decide whether or not to terminate a pregnancy. Because the statute has been once authoritatively construed by the Massachusetts Supreme Judicial Court, and because it is clear that the statute as written and construed is not constitutional, I agree with Mr. Justice Powell that the District Court's judgment should be affirmed. Because his opinion goes further, however, and addresses the constitutionality of an abortion statute that Massachusetts has not enacted, I decline to join his opinion.[12]

In an explanatory footnote, number 4, Justice Stevens stated:

> Until and unless Massachusetts or another State enacts a less restrictive statutory scheme, this Court has no occasion to render an advisory opinion on the constitutionality of such a scheme. A real statute rather than a mere outline of a possible statute - and a real case or controversy may well present questions that appear quite different from the hypothetical questions

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11. at p. 818 of 61 L.Ed.2d.
12. at p. 797 of 61 L.Ed.2d.

> Mr. Justice Powell has selected to address. Indeed, there is a certain irony in his suggestion that a statute that is intended to vindicate 'the special interests of the State in encouraging an unmarried pregnant minor to seek the advice of her parents in making the important decision whether or not to bear a child,' see ante, at ___, 61 L.Ed.2d 811, need not require notice to the parents of the minor's intended decision. That irony makes me wonder whether any legislature concerned with parental consultation would, in the absence of today's advisory opinion, have enacted a statute comparable to the one my Brethren have discussed.
>
> In his dissent, Justice White stated:
>
> > . . . Going beyond Danforth, the Court now holds it unconstitutional for a State to require that in all cases parents receive notice that their daughter seeks an abortion and, if they object to the abortion, an opportunity to participate in a hearing that will determine whether it is in the 'best interests' of the child to undergo the surgery. Until now, I would have thought inconceivable a holding that the United States Constitution forbids even notice to parents when their minor child who seeks surgery objects to such notice and is able to convince a judge that the parents should be denied participation in the decision.[13]

From the foregoing one cannot discern a clear constitutional doctrine inhibiting the State from enacting a statute, such as, Section 76-7-304(2), which merely provides for notification, if possible, of the parents of a minor contemplating an abortion.

Under Danforth, the issue then is whether the statute serves "any significant state interest" that is not present in the case of an adult, which would justify as a condition precedent to the obtaining of an abortion by a minor, the notification of her parents. First and foremost, the statute does not per se impose any restriction on the minor as to her decision to terminate her pregnancy. Second, as mentioned ante, the parent is in a position to provide valuable information concerning the factors which the physician may consider in exercising his best clinical judgment.

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13. at p. 822 of 61 L.Ed.2d.

Third, the State has a special interest in encouraging (but does not require), an unmarried pregnant minor to seek the advice of her parents in making the important decision as to whether or not to bear a child.

Justice Powell in his opinion in Bellotti stated there were "three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child-rearing."[14] In expanding on this third reason, he observed, the guiding role of parents in the upbringing of their children justifies limitations on the freedom of minors. Further, it is a cardinal principle of this nation that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. He stated:

> Properly understood, then, the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter. Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society, meaningful and rewarding. Under the Constitution, the State can 'properly conclude that parents and others, teachers for example, who have [the] primary responsibility for children's wellbeing are entitled to the support of laws designed to aid discharge of that responsibility.' [Citation][15]

The Legislature in enacting Section 76-7-303(2) has strictly limited parental involvement in the minor's abortion decision. The provision does not confer on the parent an absolute and arbitrary veto, which was found impermissible in Danforth. There is no basis to conclude this provision unduly burden's the constitutional right of the minor woman, in consultation with her physician, to choose to terminate her pregnancy; thus, it is constitutional.

Plaintiff further urges the term "if possible" in subsection (2) of Section 76-7-304 be construed as conferring on the consulting physician discretion to determine if

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14. at p. 807 of 61 L.Ed.2d.
15. at pp. 810-811 of 61 L.Ed.2d.

medically, socially, psychologically, and physically, it would be appropriate to notify the minor's parents.

There is no ambiguity in the term "if possible" within the context of subsection (2); and, therefore, there is no basis to construe the term beyond its literal, plain meaning.[16] The trial court's interpretation is consistent with the clearly expressed legislative intent, viz., the consulting physician must notify the parents, if under the circumstances, in the exercise of reasonable diligence, he can ascertain their identity and location, and it is feasible or practicable to give them notification.[17] Furthermore, within the context of what is reasonable under the circumstances, the time element is an important factor, for there must be sufficient expedition to provide an effective opportunity for an abortion.[18]

WE CONCUR:

J. Allan Crockett, Chief Justice

D. Frank Wilkins, Justice

Gordon R. Hall, Justice

I. Daniel Stewart, Justice

16. ". . .there is nothing to construe where there is no ambiguity in the statute." State v. Archuletta, Utah 529 P.2d 911, 912 (1974).
17. See 20 Words and Phrases, 1979 Supplement, p. 8, "If Possible."
18. Bellotti v. Baird, at p. 814 of 61 L.Ed.2d.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF UTAH

H___L___, on behalf of herself and all others similarly situated, Plaintiff and Appellant, v. Honorable Scott M. Matheson, individually and in his capacity as Governor of the State of Utah, and Honorable Robert B. Hansen, individually and in his capacity as Attorney General of the State of Utah, Defendants and Respondents.	)	No. 16249

NOTICE OF APPEAL
TO THE
SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that H___L___, appellant above-named, individually and on behalf of a class that she represents, hereby appeals to the Supreme Court of the United States the final Judgment of the Supreme Court of the State of Utah, as heretofore rendered and filed in this matter on the 6th day of December, 1979, affirming the Decision of the Trial Court as entered on the 26th day of December, 1978.

This appeal is taken pursuant to 28 U.S.C., Section 1257 (2) and (3).

II. The following question is presented by this Appeal and/or Petition for Writ of Certiorari:

Do the provisions of Section 76-7-304(2) Utah Code Annotated 1953, which require by the imposition of criminal sanctions, a physician in the State of Utah, prior to performing an abortion on a minor, regardless of the trimester of the minor's

pregnancy, to notify, if physically possible, her parents, when it is determined by the minor and her treating physician to be in her best medical interest that they not be so informed, violate the right of privacy of that minor which right encompasses her right to secure an abortion without undue interference by the State and violate her right to a doctor-patient relationship free of undue regulation by the State in contravention of the Fourteenth Amendment to the Constitution of the United States.

III. The Clerk of the Utah Supreme Court has been ordered to hold the Record on Appeal in this matter pending direction from the Clerk of the Supreme Court of the United States.

DATED this 26 day of December, 1979.

DAVID S. DOLOWITZ
of and for
PARSONS, BEHLE & LATIMER
Attorneys for Appellant
79 South State Street
P. O. Box 11898
Salt Lake City, Utah 84147
Telephone: (801) 532-1234

PROOF OF SERVICE

I, Lillian Hunsaker, as a secretary in the offices of Parsons, Behle & Latimer, Attorneys for Appellant herein, depose and say that on the 26th day of December, 1979, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on Paul M. Tinker, Assistant Attorney General Attorney for Respondents herein, by depositing the same in a United States mail box with first class postage prepaid addressed to Paul M. Tinker
Assistant Attorney General
236 State Capitol Building
Salt Lake City, Utah 84114.

Secretary

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

Subscribed and sworn to before me this 21st day of December, 1979.

Notary Public
Residing at Salt Lake City, Utah

My Commission Expires:

3.

FILED
MAR 18 1980
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5903

H——L——, on behalf of herself and all others similarly situated,

Appellant,

—v.—

SCOTT M. MATHESON, Governor of Utah, ET AL.,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

JURISDICTIONAL STATEMENT FILED JANUARY 7, 1980.
PROBABLE JURISDICTION NOTED FEBRUARY 25, 1980.

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IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY
STATE OF UTAH

Civil No. C-78-2719

H—— L——, on behalf of herself and all others similarly situated, PLAINTIFF AND APPELLANT

vs.

HONORABLE SCOTT M. MATHESON, individually and in his capacity as Governor of the State of Utah, and HONORABLE ROBERT B. HANSEN, individually and in his capacity as Attorney General of the State of Utah, DEFENDANTS AND RESPONDENTS

STATEMENT IN LIEU OF DOCKETING STATEMENT

The State of Utah does not maintain a Docketing Statement, accordingly, the following is submitted in lieu of a Docketing Statement in this appeal:

1. April 27, 1978, Complaint filed.
2. April 27, 1978, Motion for Affidavit in Forma Pauperis filed.
3. April 27, 1978, Motion for Temporary Restraining Order and/or Preliminary Injunction filed.
4. May 2, 1978, Motion for Temporary Restraining Order and/or Preliminary Injunction argued to the Court and taken under advisement.

5. May 8, 1978, Memorandum Decision of the Court filed.
6. May 8, 1978, Order Denying Temporary Restraining Order filed.
7. May 17, 1978, Answer filed.
8. May 30, 1978, Hearing held where plaintiff testifies and the Court orally made its decision and ruled that plaintiff could proceed without the appointment of a guardian and could proceed as the representative of a class.
9. December 26, 1978, Findings of Fact, Conclusions of Law and Judgment entered.
10. January 15, 1979, Notice of Appeal filed.
11. December 6, 1979, Opinion of the Supreme Court of the State of Utah filed.
12. December 26, 1979, Notice of Appeal to the United States Supreme Court filed.

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY
STATE OF UTAH

Civil No. C-78-2719

H—— L——, on behalf of herself and all others similarly situated, PLAINTIFF

vs.

HONORABLE SCOTT M. MATHESON, individually and in his capacity as Governor of the State of Utah, and HONORABLE ROBERT B. HANSEN, individually and in his capacity as Attorney General of the State of Utah, DEFENDANTS

COMPLAINT—Filed April 27, 1978

Plaintiff in the above-entitled matter complains of the defendants and alleges as follows:

1. Plaintiff is a citizen of the United States and a resident of the State of Utah.

2. Defendant Scott Matheson is the Governor of the State of Utah, and as such, under the constitution and laws of the State of Utah, has the duty and responsibility of enforcing the laws of the State of Utah. Article VII, Section 5, Constitution of the State of Utah.

3. Defendant Robert B. Hansen is the Attorney General of the State of Utah, and as such, under the constitution and laws of the State of Utah, has the duty and responsibility of enforcing the laws of the State of Utah. Article VII, Section 18, Constitution of the State of Utah.

4. Plaintiff is unmarried, under eighteen years, resides at home and is a dependent of her parents.

5. Plaintiff H—— L—— is currently pregnant with

an unwanted child. She is in her first trimester of pregnancy.

6. Plaintiff does not wish to inform her parents of her condition and believes that it is in her best interest that her parents not be informed of her condition.

7. The plaintiff has consulted with a counselor to assist her in deciding whether or not she should terminate her pregnancy. She determined, after consultation with her counselor that she should secure an abortion, but was advised when consulting her physician that under the provisions of Section 76-7-304(2), Utah Code Annotated, 1953, he could not and would not perform an abortion upon her without informing her parents prior to aborting her. He advised her that this is required of him by that statute and he is unwilling to perform an abortion upon her without complying with the provisions of the statute.

8. Plaintiff desires that her identity not be revealed or made public because of matters involved in the instant action and accordingly requests this Court to permit her to proceed in this matter under the pseudonym H—— L——.

9. Plaintiff desires to proceed in this matter without the appointment of a Guardian Ad Litem based on her belief that from her consultations with her counselor, her attorney and her treating physician, she understands what is involved in her decision and this action and that the appointment of a Guardian Ad Litem is not necessary.

10. The plaintiff is a member of a class that is so numerous that joinder of all member is impractical, and there are common questions of law and fact as to all members of the class and the claims of H—— L—— as representative are typical of the claims of all members of the class and H—— L——, as a representative plaintiff, will fairly and adequately protect the interests of all members of the class, and the parties opposing H—— L—— have acted and will act on grounds applicable to all members of the class; to-wit, the plaintiff is a minor who is suffering from an unwanted pregnancy which she desires to terminate and she will fairly and adequately

represented a class made up of minor women who are suffering unwanted pregnancies and desire to terminate the pregnancies but may not do so inasmuch as their physicians will not perform an abortion upon them without compliance with the provisions of Section 76-7-304(2), Utah Code Annotated, 1953.

FIRST CAUSE OF ACTION

11. Plaintiff incorporates by reference paragraphs 1 through 10 above.

12. Plaintiff desires to secure an abortion but cannot obtain an abortion inasmuch as she does not wish her parents to know that she is pregnant, nor does she want them to know that she wants to undergo and will, if permitted to do so, undergo an abortion.

13. Plaintiff is prohibited from obtaining the abortion which she desires because her physician has advised her that under the provisions of Section 76-7-304(2), Utah Code Annotated, 1953, he must notify her parents prior to the performance of an abortion and she is unwilling to have him do so.

14. Plaintiff believes it is her right to have her pregnancy aborted, and her physician, in consultation with her, has advised her that he is willing to perform this abortion if the legal situation and complications that have been effectuated by the enactment of Section 76-7-304(2), Utah Code Annotated, 1953, can be clarified, but he is unwilling to perform the abortion without complying with the statute.

15. Section 76-7-304(2), Utah Code Annotated, 1953, is unconstitutional in that it constitutes an invasion upon the privacy of the plaintiff and each member of the class that she represents, which right of privacy encompasses her right to have an abortion, particularly in the *first trimester of pregnancy*, free from regulation or interference by the State of Utah, and Section 76-7-304(2), Utah Code Annotated, 1953, unconstitutionally infringes with this right in violation of the Fourteenth Amendment to the Constitution of the United States of America.

SECOND CAUSE OF ACTION

16. Plaintiff incorporates by reference paragraphs 1 through 14 above.

17. The provisions of Section 76-7-304(2), Utah Code Annotated, 1953, are invalid in that they are an overbroad regulation infringing upon and purporting to regulate the exercise of the right of privacy of the plaintiff and all members of the class that she represents to secure an abortion, during the first trimester of pregnancy as guaranteed to each member of the class she represents by the Fourteenth Amendment to the Constitution of the United States.

THIRD CAUSE OF ACTION

18. Plaintiff incorporates by reference paragraphs 1 through 14 above.

19. The provisions of Section 76-7-304(2), Utah Code Annotated, 1953, are constitutionally invalid in that they purport to regulate the right of privacy of the plaintiff and all members of the class that she represents to consult freely with her treating physician and secure treatment where appropriate in the effectuation of an abortion without any compelling State interest in such regulation.

FOURTH CAUSE OF ACTION

20. Plaintiff incorporates by reference paragraphs 1 through 14 above.

21. The provisions of Section 76-7-304(2), Utah Code Annotated, 1953, interfere with the doctor-patient relationship with the plaintiff which is protected by her right of privacy under the Fourteenth Amendment to the Constitution of the United States of America by seeking to regulate their relationship with each other by introducing the interests of another party into the relationship and as such improperly infringe upon this constitutionally protected right.

FIFTH CAUSE OF ACTION

22. Section 76-7-304(2), Utah Code Annotated, 1953, by effectuating an unconstitutional statute in violation

of the Fourteenth Amendment to the Constitution of the United States also is in violation of Section 1983 of Title 42, United States Code. Accordingly, the plaintiff is entitled to her costs, including a reasonable attorney's fee, for the maintenance of the instant action.

WHEREFOR, plaintiff requests:

1. A declaratory judgment ruling Section 76-7-304(2), Utah Code Annotated, 1953, is unconstitutional.
2. Each of the defendants, their agents, employees, and those working in concert with them under the laws and regulations of the State of Utah be enjoined and prohibited from enforcing the unconstitutional provisions of Section 76-7-304(2), Utah Code Annotated, 1953.
3. That plaintiff be permitted to proceed in this matter under the pseudonym H—— L——, to proceed without the appointment of a Guardian Ad Litem and to proceed as the representative of the class which she purportedly represents.
4. This action proceed as a class action against the defendants.
5. That plaintiff be allowed to proceed in forma pauperis and all costs, specifically including attorney's fees, be recovered from the defendants.
6. For such further and other relief as this Court deems just and appropriate when advised in the premises.

DATED this 26th day of April, 1978.

/s/ David S. Dolowitz
DAVID S. DOLOWITZ
Attorney for Plaintiff

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

H—— L——, being first duly sworn on oath, deposes and states that she is the plaintiff in the above-entitled matter, that she has read the foregoing Complaint, knows the contents thereof and the same are true to the best of her knowledge and belief, and that she is the signator hereto.

/s/ H L
H—— L——

(Jurat omitted in printing)

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY
STATE OF UTAH

Civil No. C-78-2719

H—— L——, on behalf of herself and all others similarly situated, PLAINTIFF

vs.

HONORABLE SCOTT M. MATHESON, individually and in his capacity as Governor of the State of Utah, and HONORABLE ROBERT B. HANSEN, individually and in his capacity as Attorney General of the State of Utah, DEFENDANTS

AFFIDAVIT TO PROCEED
IN FORMA PAUPERIS—Filed Apr. 27, 1978

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

I, H—— L——, do solemnly affirm that owing to my poverty I am unable to bear the expenses of this action or the legal proceedings which I am about to commence, and I verily believe that I am entitled to the relief sought by such action and legal proceedings.

DATED this 27 day of April, 1978.

/s/ H L
H—— L——

(Jurat omitted in printing)

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY
STATE OF UTAH

Civil No. C-78-2719

H—— L——, on behalf of herself and all others similarly situated, PLAINTIFF

vs.

HONORABLE SCOTT M. MATHESON, individually and in his capacity as Governor of the State of Utah, and HONORABLE ROBERT B. HANSEN, individually and in his capacity as Attorney General of the State of Utah, DEFENDANTS

MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION—Filed April 27, 1978

H—— L——, plaintiff in the above-entitled matter, by and through her counsel of record, David S. Dolowitz, having heretofore filed a verified Complaint in which she alleges that she is pregnant, desires, after consulting with a counselor, her physician and her attorney, to terminate the pregnancy, and having been advised by her treating physician that he will not perform an abortion upon her unless he provides notice to her parents in conformity with the provisions of Section 76-7-304(2), Utah Code Annotated, 1953, which she alleges is unconstitutional as being in violation of the Fourteenth Amendment to the Constitution of the United States since she has a right to an abortion free from regulation by the State during her first trimester of pregnancy and that she will suffer irreparable injury; to-wit, not being able to secure an abortion if enforcement of the challenged provision is not enjoined so that her physician may proceed to per-

form an abortion upon her without providing notice of said action to her parents, now hereby moves the above-entitled Court to order the defendants to appear and show cause, if any they have, why they, their agents and employees, successors in office and those working under their direction and guidance pursuant to the Constitution and laws of the State of Utah, should not be enjoined and prohibited from enforcing the provisions of Section 76-7-304(2), Utah Code Annotated, 1953, during the pendency of this action.

DATED this 26th day of April, 1978.

/s/ David S. Dolowitz
DAVID S. DOLOWITZ
Attorney for Plaintiff

B. Howe

THIRD JUDICIAL DISTRICT
COUNTY OF SALT LAKE
STATE OF UTAH

H. L., PLAINTIFF

vs.

SCOTT MATHESON, DEFENDANT

MINUTE ORDER:

Case: C-78-2719
Time: 10 AM
Date: 5-2-78

P. Atty David F. Dolowitz p

D. Atty Paul M. Tinker p
Joseph P. McCarthy p

Hon. David K. Winder
Judge

L. J. Batey
Clerk

Shirleyan Henderson
Reporter

William Hyler
Baliff

ACTION TAKEN:

☐ Default Judgment_____Summons
Default of deft entered.
Pltfs Counsel Sw & Ex_____
Doc. proof offered, admitted & withdrawn
Pltf is granted a Judgment as prayed.

☐ Based upon written stipulation of respective counsel, court orders: _____

☐ Based upon motion of pltfs or defts counsel, court orders _____

☐ Based on the failure of deft to appear in response to an order of the court and on motion of pltfs counsel, court orders ——————/——————— shall issue for deft. Returnable ——————— Bail ———————

☐ Based on written stipulation of respective counsel/ motion of plaintiff's counsel, and good cause appearing therefor, court orders the above case be and the same is hereby dismissed without prejudice.

☐ Based on written motion of Pltfs counsel, court orders Deft to ans conc prop on ——————— at ———————

☐ Based on ——— motion of pltfs counsel, court orders Deft to show cause on ——————— at ———————

☐ Based on motion of pltfs counsel, pltfs ——————— is amended and made returnable on ——— at ———

☐ It appearing to the court that a writ of garnishment was issued in the proper form and an answer filed stating that the garnishee is indebted to the defendant. It is ordered that the defendant have and recover of the garnishee ——————————————

———————————————————————

for the use and benefit of the plaintiff in the sum of $———————.

Defts temporary restraining and or a preliminary injunction are argued to the court and taken under advisement.

IN THE DISTRICT COURT
OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY
STATE OF UTAH

Civil No. C-78-2719

H—— L——, on behalf of herself and all others similarly situated, PLAINTIFF

vs.

HONORABLE SCOTT M. MATHESON, individually and in his capacity as Governor of the State of Utah, and HONORABLE ROBERT B. HANSEN, individually and in his capacity as Attorney General of the State of Utah, DEFENDANTS

MEMORANDUM DECISION—May 8, 1978

Plaintiffs Motion For Temporary Restraining Order or Preliminary Injunction, having come on to be heard before the undersigned on May 2, 1978, and the plaintiff being represented by her attorney, David S. Dolowitz, and the defendants being represented by their attorneys, Joseph P. McCarthy and Paul M. Tinker, and the Court having heard the arguments of counsel and thereafter having taken the matter under advisement and having considered the matter fully, the Court now renders the following decision.

In this most difficult of cases (and where the arguments on each side are almost equally compelling) and after having carefully considered all of the authorities cited by counsel, the Court concludes that as applied to the facts alleged in the Verified Complaint and as those facts were further amplified by the representations of Mr. Dolowitz at the May 2. 1978 hearing, that 76-7-304(2) U.C.A. 1953, as amended, is not unconstitutional

under the Fourteenth Amendment to the United States Constitution and as constituting a violation of the plaintiff's right to privacy. It is further the opinion of the Court that said statute and as applied to these facts, does not interfere in a legally impermissible manner with the physician-patient relationship, nor is it in violation of Section 1983 of Title 42, U.S.C.

Although a state may not regulate or interfere, in the case of an adult woman with that woman and her physician's decision to terminate an unwanted pregnancy by abortion in the first trimester of pregnancy (*Roe* v. *Wade*, 410 U.S. 113 (1973), it is the opinion of this Court that neither that decision nor any other decision of the United States Supreme Court or other court whose decisions are binding upon this court (including *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 53 (1976), precludes a state from enacting legislation of the kind involved here and which in the case of a *minor woman* requires the woman's physician to notify her parents before undertaking to perform an abortion upon her. This is so under the facts involved here where the woman in question is age 15, unmarried, resides at home with her parents and is dependent upon them for support and where the identity of the parents is either known to the physician or easily ascertainable by him. Further, and in the instant case, there has been no special showing of detriment that might result if the parents were notified and excepting that plaintiff has alleged in her complaint that she "does not wish to inform her parents of her condition and believes that it is in her best interest that her parents not be informed of her condition".

Accordingly, plaintiff's Motion For Temporary Restraining Order or for Preliminary Injunction is hereby denied and defendants' attorneys are to prepare an appropriate order in accordance with this decision.

Dated this 8 day of May, 1978.

/s/ David K. Winder
DAVID K. WINDER
District Judge

Mailing Certificate (omitted in printing)

B. Howe

THIRD JUDICIAL DISTRICT
COUNTY OF SALT LAKE
STATE OF UTAH

H. L., ET AL., PLAINTIFF

vs.

HONORABLE SCOTT M. MATHESON, DEFENDANT

MINUTE ORDER:

Case: C-78-2719
Time: —
Date: 5-8-78

P. Atty _____

D. Atty _____

Hon. David K. Winder
Judge

L. J. Batey
Clerk

Shirleyan Henderson
Reporter

William Hyler
Baliff

ACTION TAKEN:

☐ Default Judgment_____Summons
Default of deft entered.
Pltfs Counsel Sw & Ex_____
Doc. proof offered, admitted & withdrawn
Pltf is granted a Judgment as prayed.

☐ Based upon written stipulation of respective counsel, court orders: _____

☐ Based upon motion of pltfs or defts counsel, court orders _____

☐ Based on the failure of deft to appear in response to an order of the court and on motion of pltfs counsel, court orders ——————/—————— shall issue for deft. Returnable ———— Bail ————

☐ Based on written stipulation of respective counsel/ motion of plaintiff's counsel, and good cause appearing therefor, court orders the above case be and the same is hereby dismissed without prejudice.

☐ Based on written motion of Pltfs counsel, court orders Deft to ans conc prop on ———— at ————

☐ Based on ——— motion of pltfs counsel, court orders Deft to show cause on ———— at ————

☐ Based on motion of pltfs counsel, pltfs ———— is amended and made returnable on ——— at ———

☐ It appearing to the court that a writ of garnishment was issued in the proper form and an answer filed stating that the garnishee is indebted to the defendant. It is ordered that the defendant have and recover of the garnishee ————————————

————————————————————

for the use and benefit of the plaintiff in the sum of $————.

The court rules as per memorandum decision on file herein.

IN THE DISTRICT COURT
OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY
STATE OF UTAH

Civil No. C-78-2719

H—— L——, on behalf of herself and all others similarly situated, PLAINTIFF

vs.

HONORABLE SCOTT M. MATHESON, individually and in his capacity as Governor of the State of Utah, and HONORABLE ROBERT B. HANSEN, individually and in his capacity as Attorney General of the State of Utah, DEFENDANTS

ORDER DENYING TEMPORARY
RESTRAINING ORDER OR
PRELIMINARY INJUNCTION—Filed May 8, 1978

Plaintiff's motion for a Temporary Restraining Order or Preliminary Injunction came on regularly for hearing before the Honorable David K. Winder, one of the Judges of this Court, on May 2, 1978. Plaintiff was represented by David S. Dolowitz, and Defendants were represented by Paul M. Tinker and Joseph P. McCarthy, Assistant Attorneys General.

From pleadings on file and from representations of counsel, the Court finds that plaintiff is a fifteen year old unmarried minor who resides at home with her parents and is dependent upon them for support. Plaintiff is pregnant and seeks to have an abortion performed. There has been no special showing of detriment which might result if her parents are notified except that plaintiff has alleged that she does not wish to inform her parents of her condition and believes that it is in her best inter-

est that her parents not be informed of her condition. The Court also finds that the identity of the parents is known to the physician or could be easily ascertained by said physician.

Plaintiff seeks to enjoin or restrain Defendants from enforcing the provisions of Section 76-6-304(2), Utah Code Annotated, 1953, upon the ground that it is unconstitutional under the Fourteenth Amendment of the Constitution of the United States and constitutes a violation of plaintiff's right to privacy and interferes with her physician-patient relationship in a legally impermissible manner, all in violation of her rights under 42 Utah Code Annotated, Section 1983.

The Court heard argument from counsel, carefully considered all cases cited, and concludes that while a State may not regulate or interfere with the decision of an *adult* woman and that of her physician to terminate an unwanted pregnancy during the first trimester of pregnancy, there is no decision binding upon this Court which precludes a State from enacting legislation of the kind involved here which in the case of a *minor* requires her physician to notify her parents before undertaking to perform an abortion upon her.

Now, therefore, it is hereby ORDERED that plaintiff's motion for a Temporary Restraining Order or Preliminary Injunction is denied.

Dated May 8, 1978.

By the Court:

/s/ David K. Winder
Judge

Mailing Certificate (omitted in printing)

IN THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY
STATE OF UTAH

Civil No. C-78-2719

H—— L——, on behalf of herself and all others similarly situated, PLAINTIFF

vs.

HONORABLE SCOTT M. MATHESON, individually and in his capacity as Governor of the State of Utah, and HONORABLE ROBERT B. HANSEN, individually and in his capacity as Attorney General of the State of Utah, DEFENDANTS

ANSWER—Filed May 17, 1978

Defendants, Scott M. Matheson, Governor of the State of Utah, and Robert B. Hansen, Attorney General of the State of Utah, answer the allegations of plaintiff's complaint as follows in accordance with the numbering of the complaint.

1. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 1, and therefore deny them.
2. Admitted.
3. Admitted.
4. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 4, and therefore deny them.
5. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 5, and therefore deny them.
6. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 6, and therefore deny them.

7. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 7, and therefore deny them.

8. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 8, and therefore deny them.

9. Defendants lack sufficient knowledge or information concerning plaintiff's desires concerning the appointment of a guardian ad litem in this case, and therefore deny the allegations of paragraph 9 in that regard. Defendants also deny the appropriateness of proceeding without a guardian ad litem in this case regardless of the desires of the plaintiff.

10. Defendants deny that this case presents a proper class action and specifically deny that the plaintiff can properly represent the interests of the proposed class.

11. No answer is required to paragraph 11, but to the extent that an answer may be deemed required, defendants' answers to paragraphs 1 through 10 are incorporated by reference.

12. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 12, and therefore deny them.

13. Defendants agree that Section 76-7-304(2), Utah Code Annotated, 1953, requires that a physician notify the parents of a minor girl of her desire to have an abortion, but have no knowledge or information sufficient to form a belief as to plaintiff's specific desires in the matter, and therefore deny all other allegations of paragraph 13.

14. Defendants are unaware of plaintiff's beliefs as to her rights to have an abortion or the statements or representations made to her by her physician, and therefore deny all allegations of paragraph 14.

15. Denied.

16. No answer is required to paragraph 16, but to the extent that an answer may be deemed required, defendants' answers to paragraphs 1 through 15 are incorporated by reference.

17. Denied.

18. No answer is required to paragraph 18, but to the extent that an answer may be deemed required, defendants' answers to paragraphs 1 through 17 are incorporated by reference.

19. Denied.

20. No answer is required to paragraph 20, but to the extent that an answer may be deemed required, defendants' answers to paragraphs 1 through 19 are incorporated by reference.

21. Denied.

22. Denied.

AFFIRMATIVE DEFENSES

1. The complaint fails to state a cause of action upon which relief can be granted.

2. Plaintiff is required by terms of rule 17(b) to proceed, if at all, through a guardian ad litem.

3. The relief sought by plaintiff would, if granted, constitute an invasion of rights of persons not presently represented here and who should joined, including the parents of the minor child involved.

4. The challenged statute does not infringe upon any recognized right of a minor child.

5. The challenged statute merely restates a common law requirement concerning parental rights regarding major medical procedures.

WHEREFORE, defendants respectfully pray that the complaint be dismissed with prejudice.

Dated this 16th day of May, 1978.

/s/ Joseph P. McCarthy
JOSEPH P. MCCARTHY
Assistant Attorney General
Attorney for Defendants

/s/ Paul M. Tinker
PAUL M. TINKER
Assistant Attorney General
Attorney for Defendants

Mailing Certificate (omitted in printing)

[78] IN THE DISTRICT COURT
OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY
STATE OF UTAH

Civil No. C78-2719

H—— L——, on behalf of herself and all others similarly situated, PLAINTIFF

vs.

HONORABLE SCOTT M. MATHESON, individually and in his capacity as Governor of the State of Utah, and HONORABLE ROBERT B. HANSEN, individually and in his capacity as Attorney General of the State of Utah, DEFENDANTS

REPORTER'S TRANSCRIPT

BE IT REMEMBERED that on Tuesday, May 30, 1978, at the hour of 11:00 A.M., the above-entitled cause came on regularly for hearing before the Honorable David K. Winder, Judge of the District Court, Third Judicial District, Salt Lake County, State of Utah and the following matters were heard.

* * * * *

[80] (IN CHAMBERS)

THE COURT: Let me get this on the record. This is the matter of H—— L—— versus Governor Matheson and others, Civil C78-2719. Present representing the plaintiff is Mr. David Dolowitz and representing the defendants is Mr. Joseph McCarthy and Mr. Paul Tinker.

This matter has been heard by me before and then it was continued to today. I guess your client is out here,

Mr. Dolowitz, and another lady? How do you want to proceed?

MR. DOLOWITZ: I thought that the Court and Counsel for the defendants wanted her to verify the statements that were in the Complaint made by her. It is my understanding that her identity can still remain secret and she can proceed under the name H—— L—— and I told her to respond only to that.

I would lead her through that and then we would go through the evidentiary portion in addition this afternoon.

THE COURT: What time are we figuring?

MR. DOLOWITZ: We are figuring for about 2:30. I have told Paul and Joe before we came in that there is one psychiatrist and one social worker I will be presenting as witnesses.

THE COURT: What are we looking at timewise?

MR. DOLOWITZ: I will have both of their testimonies in fairly quickly. It is a matter of cross-examination.

I want to show from them that there are circumstances where it is best where a minor, in terms of a physician, that the family not be notified and that the Utah Statute infringes on that relationship. It is not a matter [81] of theory, but in fact there are circumstances where a minor can and should be allowed to proceed on her own without an obligation to the parent.

THE COURT: They are talking in abstracts there. They never talked to her.

MR. DOLOWITZ: The counselor has talked to her and the only restriction I have there or reservation I have is that I have asked the counselor not to give out enough of the facts that would allow the family to identify her. I have indicated to you and to Joe and Paul on different occasions, her situation is dissimilar enough from what is normally thought of as being the situation that her family would identify her very quickly if the facts came out.

THE COURT: Who is the other lady?

MR. DOLOWITZ: She is my assistant, helping me.

THE COURT: Do you have any objection to proceeding this way?

MR. McCARTHY: Not generally. I would like to make it clear that we have no wish to discover her identity. I don't think that is necessary to the resolution of the case. I do think we may want to do a reasonably extensive examination of this girl, though, except in the areas of identification.

So the procedure suggested by Mr. Dolowitz is satisfactory as far as I can see.

THE COURT: All right. Why don't we have her come in and we will go from there.

(Whereupon two women entered Chambers.)

THE COURT: Could I have you stand and raise your hand to be sworn?

[82] (A lady was sworn by the Court.)

THE COURT: All right. Now, Miss, throughout this proceeding, I want you to be relaxed and be at ease here. Your identity is not going to be known by anybody and it is not going to be divulged in any way. If you think any question is asking you about your identity, don't answer it because even inadvertently or by mistake, we don't want you to divulge that.

You are going to be asked a number of other questions by Mr. Dolowitz and by the attorneys for the State of Utah about some other things. But keep your identity secret.

Could we have your assistant's name?

MR. DOLOWITZ: Kathy Garfield.

THE COURT: Go ahead, Mr. Dolowitz.

DIRECT EXAMINATION

BY MR. DOLOWITZ:

Q Ms. H —— L ——, you are a citizen of the United States, a resident of the State of Utah?

A Yes.

Q You know you were placed under oath?

A Yes.

Q You understand that means, in answering all of these questions, mine and those from the Attorney Gen-

eral's Office, you will be answering truthfully to the best of your ability all of the questions?

A Yes.

Q At the time that the Complaint in this matter was signed, you were pregnant?

[83] A Yes.

Q You had consulted with a counselor about that pregnancy?

A Yeah.

Q You had determined after talking to the counselor that you felt you should get an abortion?

A Yes.

Q You felt that you did not want to notify your parents—

A Right.

Q —of that decision? You did not feel for your own reasons that you could discuss it with them?

A Right.

Q After discussing the matter with a counselor, you still believed that you should not discuss it with your parents?

A Right.

Q And they shouldn't be notified?

A Right.

Q After talking the matter over with a counselor, the counselor concurred in your decision that your parents should be notified?

A Right.

Q You were advised that an abortion couldn't be performed without notifying them?

A Yes.

Q You then came to me to see about filing a suit?

A Right.

Q You and I discussed it as to whether or not you had a right to do what you wanted to do?

[84] A Yes.

Q You decided that, after our discussion, you should still proceed with the action to try to obtain an abortion without notifying your parents?

A Right.

Q Now, at the time that you signed the Complaint and spoke with the counselor and spoke with me, you

were in the first trimester of pregnancy, within your first twelve weeks of pregnancy?

A Yes.

Q You feel that, from talking to the counselor and thinking the situation over and discussing it with me, that you could make the decision on your own that you wished to abort the pregnancy?

A Yes.

Q You are living at home?

A Yes.

Q You still felt, even though you were living at home with your parents, that you couldn't discuss the matter with them?

A Right.

MR. DOLOWITZ: I think that would be those questions to support the allegations we put out in the Complaint.

THE COURT: Mr. McCarthy or Mr. Tinker?

MR. McCARTHY: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. McCARTHY:

Q Just to keep this straight, I really don't wish to know who you are or in any other way identify you in the [85] record. So with this understanding, if necessary—for instance, what high school do you go to? I don't care if you are in high school. I don't care whether you are East, West or Jordan or wherever.

Let's start out this way. Are you still living at home?

A Yes.

Q Are you dependent on your parents?

A Yes.

Q All your money comes from them?

A Yes.

Q How old are you now?

A Fifteen.

Q Aside from the issue of abortion, do you have any reason to feel that you can't talk to your parents about other problems?

A Yes.

Q What are those reasons?

MR. DOLOWITZ: Now you are moving into the problem area that I indicated. If she starts to identify those reasons, they tie back into the reason why, if that gets out, the family would know exactly who she was because it is a very peculiar situation.

MR. McCARTHY: I think I am entitled to inquire.

THE COURT: How is it going to get out? We will seal this record. There is nobody in this room that—

MR. DOLOWITZ: If the case winds up being on appeal, it becomes a matter of public record as a transcript—

MR. McCARTHY: I think I—

MR. DOLOWITZ: —even if it is sealed.

[86] THE COURT: Let's talk one at a time.

MR. DOLOWITZ: In terms of turning around and filing with the Supreme Court, even if we attach an order to it that it is sealed, we still have to open it and refer to it in the process of handling the appeal.

THE COURT: How can we get into this issue? How can we find out the validity of her reasons without them being permitted to cross-examine her.

I mean, just for me to allow you what you want to ask Mr. Dolowitz, and then to cut them off on such a critical matter, I think—

MR. DOLOWITZ: I am having the counselor come in this afternoon and the counselor, at least, could give her opinion as to the same thing, whether or not there were valid reasons stated as far as the counselor is concerned in a professional opinion as to why that should not be given out.

THE COURT: What you are doing is that you are putting up a bar on some extremely critical testimony that I need to have and that you are cutting the Attorney General off from.

MR. DOLOWITZ: The problem is, as I view the Court's last statement and the question we are dealing with, is that the specifics of this case versus the rights of any person in here, and that is—

Is the Court saying you have to look at the specific reasons and determine whether or not they are valid? It is our position Constitutionally that she has the right to make that decision and if she has consulted with a counselor and the counselor concurs that those are valid reasons, why then—

THE COURT: What have we—what are we here for? I [87] have already ruled on that.

MR. DOLOWITZ: I assume it was to verify this. In terms of going beyond that, our point is that the specifics of the reasons are really irrelevant to the Constitutional issue.

THE COURT: As I say, I already ruled on that.

MR. DOLOWITZ: If you carry your ruling forward, you are in a position of rewriting the statute to say that a minor has to come forward and prove in court that there are valid reasons for being allowed to proceed without notifying the parents. And the statute either says you can't do that regardless of the reason and is therefore, in our opinion, unconstitutional, or there is a built-in exception to it that you are now creating that says this is true unless there are good reasons to the contrary. That, to me, makes the actual reasons irrelevant.

THE COURT: Well, what I felt in making the decision that I did is that, based on the record that was before me and having no particular reason from her and the other facts that I stated in my Memorandum Decision, that the statute was Constitutional. But I can conceive of a situation where a child probably wouldn't have to tell the parents.

MR. DOLOWITZ: In that case, that is saying that there is going to be a judicially created exception to the statute and I don't think that can be done. If I thought it could be done, I would have framed the Complaint that way.

So either the statute—if you are right and conceivably there are those reasons, then I think you should reconsider your decision because the statute is overbroad and Constitutionally infringes where it has no business. Under [88] Roe versus Wade and Doe versus Bolton where it says the doctor and patient can gather together

and going over those factors reach that decision themselves. And the specifics of what are the reasons, I think, becomes irrelevant. Either it exists that there are valid reasons why that can be done and in that case it is a case by case determination. But our statute doesn't say that.

THE COURT: But I don't see, Mr. Dolowitz, what the point of these hearings are today? What is the point of your having this in the record?

MR. DOLOWITZ: Right now, because I am trying to show the Court—partially because I am assuming that the State wanted verification that the allegations in the Complaint were true and that H—— L—— was a live person and not someone who had been fabricated.

THE COURT: I don't think they ever questioned that. I thought they acknowledged that, based on your integrity, that what you said in the Complaint was accurate. Didn't you acknowledge that?

MR. McCARTHY: We have no reason to doubt what Mr. Dolowitz alleged. The point in the cross-examination I am making is, I think the statute has tried to balance a parental interest here to the notification. If there is a condition underwhich there may be an exceptional circumstance that would occur where a parent shouldn't be notified, obviously, I think we have to get into the maturity of the child, validity of the reasons, especially when we don't have a parental point of view here in the testimony. We don't know what the parents think because they won't be here. We are getting a view of the parents through the child who has got a [89] serious problem.

I think if there is any point here at all in the examination, certainly we ought to be able to go into the depths of it.

THE COURT: Well, I think, if we are going to go into this at all, we have to go into it fully.

MR. DOLOWITZ: I am indicating that I have the expert coming in to testify and I know of the theories of cases they are going to present and the theories that they will present to the Court as to those circumstances and those cases where it is in the best interest of the minor that the minor should go ahead.

What I am saying is, in light of the Utah Statute, unless the Court is rewriting that statute, this is totally irrelevant as to what the reasons are because the statute makes only one exception and that is "if possible."

Now, if you are saying that if conditions exist that allow a physician to make that determination that it is not possible because of, let's just say, the family situation and you construe the statute that way, then it would be relevant. We would move away from the Constitutional issue. That is what I said in oral argument.

Now, if that is the meaning you are placing on the words "if possible," then my objection to irrelevancy would have to be withdrawn. If you are saying "if possible," is only a matter of physical—do you know the identity and can you actually reach them, that pivots around there. If "if possible" means, as far as you are concerned in interpreting this statute, that if there are reasons that they shouldn't be notified and the doctor can make that decision in con- [90] sulting with his patient that it is not possible to notify them, then this is a reasonable inquiry.

THE COURT: I understand that and I really haven't thought about that enough to make a ruling on something that important. But my point is this—

MR. DOLOWITZ: I think it is crucial for her right now.

THE COURT: I understand that. But I don't think you should be permitted to go into what you have been going into and then shut the door on the State.

I don't think there is any point in having the hearing this afternoon. I don't know what we are doing any of this for.

MR. DOLOWITZ: I think we are doing it to show that that statute is overbroad, which is something I have asserted to you in theory, in legal theory. I want to show you in fact that it is.

MR. TINKER: Within these facts?

MR. DOLOWITZ: I didn't bring up specific cases.

THE COURT: But the thing is, in order to go into some of the facts, it seems to me that you have got to go into all of the facts, not just the facts that you think

are appropriate or pertinent, because they have got to be able to cross-examine. You are going to be asking these experts this afternoon things that you are now shutting the door on them probing into here.

MR. DOLOWITZ: Because as far as I am concerned, this afternoon we are dealing with what is the whole class and we are dealing with experts who deal across the board. Right now, we are asking her opinion as to why she can't do it. She is not going to qualify as an expert. She is just going to say [91] her own personal reasons.

Now those reasons or the validity of them, unless this court is ruling that "if possible" means that the physician can listen to those reasons and determine that it is appropriate to go into it and then make the same determination as the Court is now being asked to make, the possibility—

I don't know if what I am saying is clear.

THE COURT: It is clear. I don't think "if possible" means that.

MR. DOLOWITZ: Then in that case, her particular reasons are irrelevant because the statute says they don't make any difference. It simply says "if possible." Do you know where they are? Can you reach them? If that is the interpretation, then any reason she might have for wanting to go ahead is not relevant because the statute says you can't go into it.

MR. McCARTHY: Then I see no point in taking any witness testimony whatever. There is no class certified in the first place. There is no ruling whether she is an appropriate representative of the class, none of these things.

THE COURT: I don't know why we are here, Sandy.

MR. DOLOWITZ: We are here because they asked to be here. I was willing to go ahead and close it and it was my understanding—

MR. McCARTHY: We were—

MR. DOLOWITZ: —wanted to go ahead.

THE COURT: One at a time, please.

MR. McCARTHY: I never objected to quitting winners, which I thought we were before today. I thought you wished to make a better record for appeal. This is the only reason [92] I am here, as far as I am concerned.

MR. DOLOWITZ: I was willing to make a cross-motion for Summary Judgment. I thought you wanted to go ahead. I was willing to accept the record and the judge's determination because I think we are right now at the heart of what the issue is because the issue is, can you go beyond a simple showing of minority and ability to contact the parents? If you can't, then the words "if possible" require a construction so that the doctor and the court can go beyond the statute and determine it.

If the doctor can decide that there are reasons why she should not contact a minor's parents, then that comes in only under the wording "if possible." And we don't have a Constitutional issue. Then, on that construction of the statute, if the Court determined that was the construction of the statute, the case doesn't need to go any further because the doctors can sit down and make that determination and go ahead. And I will even accept a dismissal of the case because, with that type of construction, we have established what I think the law reasonably is.

If, on the other hand, "if possible" means only physically possible, then we have a flat-out Constitutional issue. You have cut off any further inquiry and the specifics of the reason why should have to be left to the doctor and patient under the Bolton decision.

MR. McCARTHY: I think what we have now is a case in a very abstract posture with no facts. If you want to stand on that, that suits me fine.

THE COURT: There is no point in going beyond that.

MR. McCARTHY: I don't see any point in any testimony, [93] if that is where you want to stand.

MR. TINKER: I don't wish to appear quarrelsome, but I think it might be helpful to the Judge to go back and see just—at least my understanding or my recollec-

tion of why we are here this morning. After the previous hearing, my recollection is that you talked to us about the possibility of bringing in some expert witnesses to—I think your term was "to close the facts of the petition." And you inquired of us whether we would be willing to stipulate to the particular facts of this case. I discussed that with Joe and we said we were willing to allow some more evidence to come in, in terms of experts. But we were not willing to stipulate to all the facts in the Complaint. That is what occasioned, really, this morning's part of the hearing. The idea for this afternoon was your wish to get these experts in. That is my recollection.

If that is not accurate, I think it would be helpful to Judge Winder to clarify that.

MR. McCARTHY: I would say one thing further, if I may, and I think without this basic testimony, all the expert testimony in the world has nothing to do with what we are talking about.

MR. TINKER: That was essentially our reason for saying we couldn't stipulate to the facts in the Complaint as such. We felt there were facts there which needed to be in the record and our opportunity to cross-examine on those preliminary to any of that kind of testimony. I think that is essentially where we are hung up now.

MR. DOLOWITZ: I think it depends on a ruling from you, Your Honor, on what does "if possible" mean?

[94] THE COURT: I think "if possible," if he is able to physically contact them.

MR. DOLOWITZ: Then there is no relevancy to any other facts. Is that correct, under your interpretation of the law? It wouldn't make any difference if we brought in, not only H—— L——, but let's say dozens of girls and dozens of doctors and psychiatrists saying that you ought to go ahead; they can handle it and they can make the decision. That would be irrelevant because as far as you are concerned, "if possible" means physically locate. They have no right to go ahead under that statute. Is that a correct interpretation of your ruling?

THE COURT: I really—I would like to think about it because I haven't thought about it in terms of the "if possible." It just seems to me that, under circumstances that it might be Constitutional as relating to—and maybe I misconceived what it ought to be. But it might be Unconstitutional as it relates to a particular fact situation but Constitutional as it relates to another fact situation. But you don't press that theory. You think the only way you can get into a difference in the facts is under "if possible"?

MR. DOLOWITZ: That is right because the statute says, it says that before a doctor, in order to exercise his best medical judgment, before performing an abortion on a minor, he must notify, if possible, the parents of a minor. That wording is that he must do it.

I asserted to you in our prior argument that that has nothing to do with his medical judgment. That is an overbroad infringement and you said, "No, that is a valid exercise by the State.

[95] I am saying, if that is true, then the particular facts that come before him are irrelevant. The only escape clause in that language—and I use "escape clause" in quotation marks—is "if possible." That is vague and you received the interpretation that Judge Lewis made on that. He said he didn't know what it meant. When we argued it, I pointed out, if that means and is interpreted to mean only physically that he can do it, then there is no exception. He is told he has to do it for his exercise of his medical judgment. The specific facts of any individual case, no matter how ridiculous they are or how strong or weak they are, really become irrelevant.

Our position is that it is the doctor/patient relationship that is the key. If the doctor determines he should go ahead with the patient, then he should. The specific facts in any case, whether he is wrong or right, are Constitutionally protected to make that decision and go ahead and act on it. This is why I say it is irrelevant.

Now, if the determination that "if possible" means that if the doctor, after talking to the patient says, "Well, I really shouldn't do it and it is not possible to do it in terms of your best interest," then it would be irrelevant.

We could go into it but we wouldn't have a lawsuit because, at that point, then the doctor and the patient reached that decision.

I guess, if the State decides they are wrong in any case, they can come in and try to prosecute and the issue becomes whether or not that was the right determination. This is why your ruling, I think, on that has to decide.

THE COURT: Well, I don't see any point in going forward.

[96] MR. McCARTHY: Only one other question I think is material and I will submit it to you before I ask it. I think we have a right to inquire whether the witness is still pregnant, first of all, to meet the standard; and secondly, to be a proper class representative.

MR. DOLOWITZ: I am going to object to that. The Supreme Court in Doe versus Bolton and Danforth and in Griswold versus Kennecott said that this is a continuing controversy type of problem. If someone is going to be pregnant, it is going to end and it is irrelevant. We are not going to get to the U.S. Supreme Court in only nine months. It is only seven or eight months from the filing of the Complaint. It would be relevant if we were asking for a speedy decision. We are not asking for that anymore.

MR. TINKER: I would hope you were correct, but I am not convinced that "continuing controversy" is a valid doctrine in the State Court. I addressed that on oral argument.

THE COURT: I will sustain that objection. I don't think she has to answer that, but I don't see any point in going forward, Sandy.

MR. DOLOWITZ: If your ruling is that "if possible" is physical and there are no circumstances whatever that justify the violation of the statute, then the issue is closed. I think probably I ought to—we will have a transcript of this made up and attach it in the judgment to be entered.

THE COURT: All right.

MR. DOLOWITZ: It seems to me that closes all the legal issues. There is nothing left for me to do except to appeal it and see where we go from here. Because

that ruling does [97] close off all of the questions of fact, it would seem to me, or questions of law. The facts won't make any difference.

THE COURT: Well, that is the way that I interpret that statute now that that is brought more clearly to me than it was before. So I don't see any point in going forward.

MR. McCARTHY: Your Honor, as long as you still have a point or two to make, could we have a ruling on the necessity of a guardian being appointed here?

THE COURT: I don't think that a guardian has got to be appointed. I think that is a decision on the Constitutional issue, for all intents and purposes. If I made her have a guardian, it would notify the parents. So I will rule against you on that.

MR. McCARTHY: All right, fine. Thank you.

THE COURT: Well, I am sorry we weren't clear and put her to all this.

MR. DOLOWITZ: I knew this was a floating issue because the "if possible" hadn't been addressed in the Memorandum Decision. I thought this was a good way of clarifying it.

I agree with Paul that they wouldn't stipulate and I thought when this question came up, if there was going to be an inquiry as to the specifics of her reasons, that would most clearly—rather, be abstractly but in a concrete form—frame up the issue of what we are really facing and whether any facts in any case made any difference under the Utah Statute. I asserted to you in Court that it didn't and you now have ruled, right, it didn't.

In contrast, I said that makes it Unconstitutional and you said, "No."

MR. McCARTHY: I would like to make one more comment [98] for the record. When we are talking about minors, we are talking essentially about the fact that somewhere along the line, a person becomes an adult by a rather arbitrary ruling, age 18. Now I think if there are rights involved between parent and child in connection with abortion, I think maturity is a factor that would have to be considered and a great many other

things, which is what I think the point of factual testimony would be necessary to make this theory of Mr. Dolowitz's further down to the road.

MR. DOLOWITZ: I would agree with you about the facts if the Court ruled that the facts made any difference.

THE COURT: Thank you, gentlemen.

MR. McCARTHY: I think we all understand each other.

Reporter's Certificate (omitted in printing)

THIRD JUDICIAL DISTRICT
COUNTY OF SALT LAKE
STATE OF UTAH

File No. C78-2719

H. L. on behalf of herself, ET AL. P

vs.

HONORABLE SCOTT M. MATHESON NP

COUNSEL:

David S. Dolowitz
Kathy Garfield
(S. D. Dolowitz's assistant)
Paul M. Tinker P
Joseph P. McCarthy P

L. J. Batey, Clerk	Hon. David K. Winder
Shirleyan Henderson, Reporter	Judge
William Hyler, Bailiff	Date: 5-31-78

The case comes now on regularly before the court for hearing. Parties appearing as shown above. H. L. is sworn and examined in behalft of the pltfs. Based upon courts own motion, the court orders that a guardian not be appointed. The court having considered, now being fully advised in the premises, orders that a judgment be entered as will be formalized in an order.

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY
STATE OF UTAH

Civil No. C-78-2719

H—— L——, on behalf of herself and all others similarly situated, PLAINTIFF

vs.

HONORABLE SCOTT M. MATHESON, individually and in his capacity as Governor of the State of Utah, and HONORABLE ROBERT B. HANSEN, individually and in his capacity as Attorney General of the State of Utah, DEFENDANTS

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed Dec. 26, 1978

The above-entitled matter came duly before the above entitled Court for trial on Wednesday, the 31st day of May, 1978, the Honorable David K. Winder presiding. The plaintiff was present in person and represented by counsel, David S. Dolowitz. The defendants were represented by counsel, Joseph McCarthy and Paul M. Tinker, Assistant Attorney Generals. The Court, after hearing the testimony of the plaintiff and having examined the records, files, papers and memoranda submitted on behalf of the respective parties and considering the arguments of counsel, now hereby makes and enters the following

FINDINGS OF FACT

1. The plaintiff is a citizen of the United States and a resident of the State of Utah.

2. Defendant Scott Matheson is the Governor of the State of Utah, and as such, under the Constitution and

laws of the State of Utah, has the duty and responsibility of enforcing the laws of the State of Utah. Article VII, Section 5, Constitution of the State of Utah.

3. Defendant Robert B. Hansen is the Attorney General of the State of Utah, and as such, under the Constitution and laws of the State of Utah, has the duty and responsibility of enforcing the laws of the State of Utah. Article VII, Section 18, Constitution of the State of Utah.

4. Plaintiff is unmarried, fifteen years of age, resides at home and is a dependent of her parents.

5. Plaintiff, H—— L——, was pregnant with an unwanted child in her first trimester of pregnancy at the time of the filing of the Complaint in this matter.

6. Plaintiff did not wish to inform her parents of her condition and believed it was in her best interest that they not be informed of her condition.

7. The plaintiff consulted with a counselor to assist her in deciding whether or not she should terminate her pregnancy. She determined, after consultation with her counselor, that she should secure an abortion, but was advised when consulting her physician that under the provisions of Section 76-7-304(2), Utah Code Annotated, 1953, that he believed along with her that she should be aborted and that he felt it was in her best medical interest to do so but he could not and would not perform an abortion upon her without informing her parents prior to aborting her because it was required of him by that statute and he was unwilling to perform an abortion upon her without complying with the provisions of the statute even though he believed it was best to do so.

8. Plaintiff desired that her identity not be revealed or made public because of matters involved in the instant action and accordingly requested this Court to permit her to proceed in this matter under the pseudonym H—— L——.

9. Plaintiff requested in this matter that she be allowed to represent a class in that the members of that class are so numerous that joinder of all members was impractical, and there were common questions of law and fact as to all members of the class and the claims of

H—— L—— as representative were typical of the claims of all members of the class.

From the foregoing Findings of Fact, this Court now makes and enters the following

CONCLUSIONS OF LAW

1. Plaintiff should be permitted to proceed in this matter without the appointment of a Guardian Ad Litem.

2. Plaintiff is an appropriate representative to represent the class she purports to represent.

3. The termination of the plaintiff's pregnancy would not moot this case.

4. The provisions of Section 76-7-304(2), Utah Code Annotated, 1953, which provides in relevant portion:

> To enable the physician to exercise his best medical judgment, he shall:
>
> * * *
>
> (2) notify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed, if she is a minor or the husband of the woman, if she is married.

require the treating physician to notify if it is physically possible; that is, if he knows or can determine the identity of the parents of a minor and he is physically able to notify them, that he do so prior to the performance of an abortion upon a minor.

5. The provisions of Section 76-7-304(2), Utah Code Annotated, 1953, as thus interpreted are constitutionally valid and do not unconstitutionally restrict the right of privacy of a minor to secure an abortion or to enter into a doctor-patient relationship.

6. The provisions of Section 76-7-304(2), Utah Code Annotated, 1953, do not violate the provisions of Section 1983 of Title 42, United States Code, by effectuating an unconstitutional infringement upon the right of privacy of a minor seeking an abortion in the State of Utah nor of a minor to a doctor-patient relationship.

7. Judgment should be entered in favor of the defendants.

DATED this 26 day of December, 1978.

BY THE COURT:

/s/ David K. Winder
DAVID K. WINDER
District Judge

Certificate of Mailing (omitted in printing)

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY
STATE OF UTAH

Civil No. C-78-2719

H—— L——, on behalf of herself and all others similarly situated, PLAINTIFF

vs.

HONORABLE SCOTT M. MATHESON, individually and in his capacity as Governor of the State of Utah, and HONORABLE ROBERT B. HANSEN, individually and in his capacity as Attorney General of the State of Utah, DEFENDANTS

JUDGMENT—Filed Dec. 26, 1978

The above-entitled matter came duly before the above-entitled Court for trial on Wednesday, the 31st day of May, 1978, the Honorable David K. Winder presiding. The plaintiff was present in person and represented by counsel, David S. Dolowitz. The defendants were represented by counsel, Joseph McCarthy and Paul M. Tinker, Assistant Attorney Generals. The Court, after hearing the testimony of the plaintiff, having examined the records, files, papers and memoranda submitted on behalf of the respective parties, considering the arguments of counsel and having heretofore entered its Findings of Fact and conclusions of Law

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Plaintiff is permitted to proceed in this matter without the appointment of a Guardian Ad Litem.
2. Plaintiff is an appropriate representative to represent the class she purports to represent.

3. The termination of the plaintiff's pregnancy would not moot this case.

4. The provisions of Section 76-7-304(2), Utah Code Annotated, 1953, which provides in relevant portion:

> To enable the physician to exercise his best medical judgment, he shall:
>
> * * * *
>
> (2) notify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed, if she is a minor or the husband of the woman, if she is married.

require the treating physician to notify if it is physically possible; that is, if he knows or can determine the identity of the parents of a minor and he is physically able to notify them, that he do so prior to the performance of an abortion upon a minor.

5. The provisions of Section 76-7-304(2), Utah Code Annotated, 1953, as thus interpreted, are constitutionally valid and do not unconstitutionally restrict the right of privacy of a minor to secure an abortion or a doctor-patient relationship.

6. The provisions of Section 76-7-304(2), Utah Code Annotated, 1953, do not violate the provisions of Section 1983 of Title 42, United States Code, by effectuating an unconstitutional infringement upon the right of privacy of a minor seeking an abortion in the State of Utah nor of a minor to a doctor-patient relationship.

7. The Complaint of the plaintiff is hereby dismissed.

DATED this 26 day of December, 1978.

BY THE COURT:

/s/ David K. Winder
DAVID K. WINDER
District Judge

Certificate of Mailing (omitted in printing)

IN THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY
STATE OF UTAH

Civil No. C-78-2719

H—— L——, on behalf of herself and all others similarly situated, PLAINTIFF

vs.

HONORABLE SCOTT M. MATHESON, individually and in his capacity as Governor of the State of Utah, and HONORABLE ROBERT B. HANSEN, individually and in his capacity as Attorney General of the State of Utah, DEFENDANTS

NOTICE OF APPEAL—Filed Jan. 15, 1979

Plaintiff in the above-entitled matter hereby appeals the Order and Judgment of this Court dated the 26th day of December, 1978 as made and entered by the Honorable David K. Winder, one of the Judges of the above-entitled Court.

DATED this 11th day of January, 1979.

/s/ David S. Dolowitz
DAVID S. DOLOWITZ
Attorney for Plaintiff

Certificate of Mailing (omitted in printing)

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY
STATE OF UTAH

Civil No. C-78-2719

H—— L——, on behalf of herself and all others similarly situated, PLAINTIFF

vs.

HONORABLE SCOTT M. MATHESON, individually and in his capacity as Governor of the State of Utah, and HONORABLE ROBERT B. HANSEN, individually and in his capacity as Attorney General of the State of Utah, DEFENDANTS

AFFIDAVIT TO PROCEED IN FORMA PAUPERIS

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

I, H—— L——, do solemnly affirm that owing to my poverty I am unable to bear the expenses of this action or the legal proceedings which I am about to commence, and I verily believe that I am entitled to the relief sought by such action and legal proceedings.

DATED this 27 day of April, 1978.

/s/ H L
H—— L——

Jurat (omitted in printing)

IN THE SUPREME COURT
OF THE STATE OF UTAH

No. 16249

H—— L——, on behalf of herself and all others similarly situated, PLAINTIFF AND APPELLANT

v.

HONORABLE SCOTT M. MATHESON, individually and in his capacity as Governor of the State of Utah, and HONORABLE ROBERT B. HANSEN, individually and in his capacity as Attorney General of the State of Utah, DEFENDANTS AND RESPONDENTS

OPINION—Filed December 6, 1979

MAUGHAN, Justice

Plaintiff, seeking declaratory and injunctive relief, initiated this action for the purpose of having Section 76-7-304(2) declared unconstitutional and to enjoin the enforcement thereof. The trial court found the provision constitutionally valid, and plaintiff appeals therefrom. The judgment is affirmed. All statutory references are to the 1953 Utah Code Annotated, as amended.

Plaintiff, a fifteen year old girl, alleged she was pregnant with an unwanted child. She asserted she was in her first trimester of pregnancy. She claimed she did not wish to inform her parents of her condition, and she believed it to be in her best interests not to impart such information to her parents. She averred, she was determined to secure an abortion after consultation with her counselor.

Plaintiff consulted her physician. He advised her, under Section 76-7-304(2), he could not and would not perform the abortion, without first notifying her parents.

Section 76-7-304, provides:

> To enable the physician to exercise his best medical judgment, he shall:
>
> (1) Consider all factors relevant to the well-being of the woman upon whom the abortion is to be performed including, but not limited to,
>
> (a) Her physical, emotional and psychological health and safety,
>
> (b) Her age,
>
> (c) Her familial situation.
>
> (2) Notify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed, if she is a minor or the husband of the woman, if she is married.

This provisions is part of the criminal code, as provided in Section 76-7-314(3). Such may be punishable by imprisonment for a term not exceeding one year, as provided in Section 76-3-204(1); together with a fine not exceeding $1,000, pursuant to Section 76-3-301(3).

Plaintiff proceeded in a class action, asserting the statute constituted an invasion of privacy of each member of the class, whom she represented. Specifically, she claimed the right of privacy encompassed the right to have an abortion, particularly in the first trimester of pregnancy, free from regulation or interference by the State of Utah. She urged the statute unconstitutionally infringed the right of privacy and thus violated the Fourteenth Amendment of the Constitution of the United States. She further asserted the statute was an overly broad regulation, which interfered with her right to consult freely with her treating physician, and to secure treatment, where appropriate, in the effectuation of an abortion without any compelling State interest in such regulation.

In its order denying a temporary restraining order, the trial court found plaintiff had made no special showing of detriment which might result if her parents were notified except for plaintiff's allegations she did not wish

to inform her parents, and believed it was in her best interests to withhold this information. The trial court further found the identity of the parents was known or could be easily ascertained by the consulting physician. The trial court concluded, while a State may not regulate or interfere with the decision of an adult woman, and that of her physician, to terminate an unwanted pregnancy during the first trimester, there was no binding decision, which precluded a State from enacting a legislative provision requiring a physician to notify the parents of a minor prior to performing an abortion.

The trial court entered a judgment, dismissing plaintiff's action. The trial court found plaintiff was unmarried, fifteen years of age, resided at home, was a dependent of her parents, and was in the first trimester of her pregnancy at the time her complaint was filed. The Court further ruled plaintiff was an appropriate representative to represent the class she purported to represent. The trial court interpreted Section 76-7-304(2) as requiring the treating physician to notify, if it be physically possible, viz., if he knows or can determine the identity of the parents of a minor, and he is physically able to notify them, that he do so prior to the performance of an abortion upon a minor. The trial court ruled, as thus interpreted, the statute was valid and did not unconstitutionally restrict the right of privacy of a minor to secure an abortion, or to enter into a doctor-patient relationship.

On appeal, plaintiff contends Section 76-7-304(2), as interpreted by the trial court, violates the Fourteenth Amendment of the Constitution of the United States. She urges, in the first trimester, the State cannot interfere at all with the fundamental interest of the pregnant woman in making an abortion decision in consultation with her physician. In the alternative, plaintiff contends this overly-broad regulation of the exercise of constitutionally protected rights can be so construed as to be valid. Specifically, plaintiff urges the term "if possible" be interpreted as conferring on the physician and patient the discretion to determine if medically, socially, psychologically, and physically it would be appropriate to notify the minor's parents.

In Roe v. Wade [1] the Court ruled the right of privacy, found in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, is broad enough to encompass a woman's decision as to whether to terminate her pregnancy. This right of personal privacy, including the abortion decision is not unqualified and must be considered against state interests in regulation. However, a regulation limiting a fundamental right may be justified only by a compelling state interest. Furthermore, such legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.

The Court ruled in Roe v. Wade,[2] with respect to the stage prior to approximately the end of the first trimester, "The attending physician, in consultation with his patient, is free to determine, without regulation by the State, that in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State."

It further held the State may place increasing restrictions on abortion as the period of pregnancy lengthens, so long as those restrictions are tailored to the recognized state interests. The Court stated:

> . . . The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician. If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra professional are available.[3]

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[1] 410 U.S. 113, 153.

[2] 410 U.S. 163.

[3] 410 U.S. 165-166.

In the companion case of Doe v. Bolton [4] the Court ruled the abortion determination, so far as the physician is concerned, is made in the exercise of his best clinical judgment in the light of all the attendant circumstances. The physician may range farther afield wherever his medical judgment, properly and professionally exercised, so dictates and directs him. His "medical judgment may be exercised in the light of all factors physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors relate to health. This allows the attending physician the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman."

The aforecited factors, which the physician may consider in making his best medical judgment were incorporated in subsection (1) of Section 76-7-304, the challenged statute. The notification provision of subsection (2) is substantially and logically related to the factors in subsection (1), for it is the parent of the minor, who would frequently possess additional information, which might prove invaluable to the physician in exercising his "best medical judgment." The notification provision merely gives the parents the option to respond and to consult with the physician and child. The statute does not confer a veto-power on anyone to overrule the determination of the doctor and his patient.[5]

Neither the *Roe* nor the *Doe* decision considered the issue of a pregnant minor seeking an abortion. In Planned Parenthood of Central Missouri v. Danforth [6] the Court ruled the State may not impose a blanket provision, requiring the consent of a parent or person in *loco parentis* as a condition for abortion of an unmarried minor during the first twelve weeks of her pregnancy. The Court explained the State does not have the constitu-

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[4] 410 U.S. 179, 191-192 (1972).

[5] The issue of parental consent for a surgical procedure on a minor child has not been presented to the court and will not be discussed.

[6] 428 U.S. 52, 74-75 (1976).

tional authority to give a third party an absolute, and possibly arbitrary veto over the decision of the physician and his patient, to terminate the patient's pregnancy, regardless of the reason for withholding the consent.

The Court stated:

> Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights. [Citations] The Court indeed, however, long has recognized that the State has somewhat broader authority to regulate the activities of children than of adults. [Citations] It remains, then, to examine whether there is any significant state interest in conditioning an abortion on the consent of a parent or person in *loco parentis* that is not present in the case of an adult.

It was urged before the court the State had a substantial interest in safeguarding the family unit and parental authority. The court responded it could not conclude conferring a veto power on the parent would strengthen the family unit or enhance parental authority and control where the minor and nonconsenting parent were so fundamentally in conflict, and the existence of the pregnancy already had fractured the family structure.

> Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant.

The Court did qualify its holding by stating it had not suggested every minor, regardless of age or maturity, might give effective consent for termination of her pregnancy. The fault of the challenged Missouri statute was it imposed a special consent provision, exercisable by a person other than the woman and her physician, as a prerequisite to a minor's termination of her pregnancy;

and did so without a sufficient justification for the restriction, thus violating the strictures of *Roe* and *Doe*.

In Carey v. Population Services International[7] the Court cited Planned Parenthood and stated the right to privacy in connection with decisions affecting procreation extends to minors as well as to adults. The Court reiterated the standard, that State restrictions inhibiting privacy rights of minors are valid only if they serve a *significant state interest*, which is not present in the case of an adult.

The concurring opinion of Justice Powell in Carey is of particular significance in an attempt to understand his opinion in the Court's most recent decision concerning a minor's right to an abortion, Bellotti v. Baird.[8] In Carey, he said:

> Requiring minors to seek parental guidance would be consistent with our prior cases. In Planned Parenthood, we considered whether there was 'any significant state interest in conditioning [a minor's] abortion [decision] on the consent of a parent or person in loco parentis that is not present in the case of an adult.' [Citation] Observing that the minor necessarily would be consulting with a physician on all aspects of the abortion decision, we concluded that the Missouri requirement was invalid because it imposed 'a special consent provision, exercisable by a person other than the woman and her physician, as a prerequisite to a minor's termination of her pregnancy and [did] so without a sufficient justification for the restriction.' Ibid. But we explicitly suggested that a materially different constitutional issue would be presented with respect to a statute assuring in most instances consultation between the parent and child. [Citations]
>
> A requirement of prior parental consultation is merely one illustration of permissible regulation in this area. . . .[9]

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[7] 431 U.S. 678, 693 (1977).

[8] —— U.S. ——, 61 L.Ed.2d 797, 99 S.Ct. 3035, July 2, 1979.

[9] 431 U.S. 709-710.

In Bellotti v. Baird [10] the issues of consent and notification, where a minor desired an abortion, were inextricably intertwined. However, there is language in the main *opinion* which would appear to hold unconstitutional a statutory provision requiring parental consultation or notification in every instance, without affording the pregnant minor an opportunity to receive an independent judicial determination that she is mature enough to consent or that an abortion would be in her best interests.[11]

Under the challenged statutory scheme in Bellotti, all minors were required to obtain the consent of both parents or in the alternative the consent of the court prior to procuring an abortion. If the minor elected to seek court consent, there was a mandatory notification of the parents of the pending court action. It was within this context Justice Powell ruled the blanket notification requirement unconstitutional. Significantly, a majority of the court refused to join in Justice Powell's opinion. Justice White dissented, and three Justices joined in the opinion of Justice Stevens, concurring in the judgment.

Justice Stevens stated:

> In short, it seems to me that this case is governed by Danforth; to the extent this statute differs from that in Danforth, it is potentially even more restrictive of the constitutional right to decide whether or not to terminate a pregnancy. Because the statute has been once authoritatively construed by the Massachusetts Supreme Judicial Court, and because it is clear that the statute as written and construed is not constitutional, I agree with Mr. Justice Powell that the District Court's judgment should be affirmed. Because his opinion goes further, however, and addresses the constitutionality of an abortion statute that Massachusetts has not enacted, I decline to join his opinion.[12]

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[10] Note 8, supra.

[11] At p. 818 of 61 L.Ed.2d.

[12] At p. 797 of 61 L.Ed.2d.

In an explanatory footnote, number 4, Justice Stevens stated:

> Until and unless Massachusetts or another State enacts a less restrictive statutory scheme, this Court has no occasion to render an advisory opinion on the constitutionality of such a scheme. A real statute rather than a mere outline of a possible statute—and a real case or controversy may well present questions that appear quite different from the hypothetical questions Mr. Justice Powell has elected to address. Indeed, there is a certain irony in his suggestion that a statute that is intended to vindicate 'the special interests of the State in encouraging an unmarried pregnant minor to seek the advice of her parents in making the important decision whether or not to bear a child,' see ante, at ——, 61 L.Ed.2d 811, need not require notice to the parents of the minor's intended decision. That irony makes me wonder whether any legislature concerned with parental consultation would, in the absence of today's advisory opinion, have enacted a statute comparable to the one my Brethren have discussed.

In his dissent, Justice White stated:

> . . . Going beyond Danforth, the Court now holds it unconstitutional for a State to require that in all cases parents receive notice that thier daughter seeks an abortion and, if they object to the abortion, an opportunity to participate in a hearing that will determine whether it is in the 'best interests' of the child to undergo the surgery. Until now, I would have thought inconceivable a holding that the United States Constitution forbids even notice to parents when their minor child who seeks surgery objects to such notice and is able to convince a judge that the parents should be denied participation in the decision.[13]

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[13] At p. 822 of 61 L.Ed.2d.

From the foregoing one cannot discern a clear constitutional doctrine inhibiting the State from enacting a statute, such as, Section 76-7-304(2), which merely provides for notification, if possible, of the parents of a minor contemplating an abortion.

Under *Danforth*, the issue then is whether the statute serves "any significant state interest" that is not present in the case of an adult, which would justify as a condition precedent to the obtaining of an abortion by a minor, the notification of her parents. First and foremost, the statute does not per se impose any restriction on the minor as to her decision to terminate her pregnancy. Second, as mentioned ante, the parent is in a position to provide valuable information concerning the factors which the physician may consider in exercising his best clinical judgment. Third, the State has a special interest in encouraging (but does not require), an unmarried pregnant minor to seek the advice of her parents in making the important decision as to whether or not to bear a child.

Justice Powell in his opinion in *Bellotti* stated there were "three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child-rearing." [14] In expanding on this third reason, he observed, the guiding role of parents in the upbringing of their children justifies limitations on the freedom of minors. Further, it is a cardinal principle of this nation that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. He stated:

> Properly understood, then, the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter. Legal restrictions on minors, especially those supportive of

[14] At p. 807 of 61 L.E.2d.

> the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society, meaningful and rewarding. Under the Constitution, the State can 'properly conclude that parents and others, teachers for example, who have [the] primary responsibility for children's wellbeing are entitled to the support of laws designed to aid discharge of that responsibility.' [Citation] [15]

The Legislature in enacting Section 76-7-303(2) has strictly limited parental involvement in the minor's abortion decision. The provision does not confer on the parent an absolute and arbitrary veto, which was found impermissible in *Danforth.* There is no basis to conclude this provision unduly burden's the constitutional right of the minor woman, in consultation with her physician, to choose to terminate her pregnancy; thus, it is constitutional.

Plaintiff further urges the term "if possible" in subsection (2) of Section 76-7-304 be construed as conferring on the consulting physician discretion to determine if medically, socially, psychologically, and physically, it would be appropriate to notify the minor's parents.

There is no ambiguity in the term "if possible" within the context of subsection (2); and, therefore, there is no basis to construe the term beyond its literal, plain meaning.[16] The trial court's interpretation is consistent with the clearly expressed legislative intent, viz., the consulting physician must notify the parents, if under the circumstances, in the exercise of reasonable diligence, he can ascertain their identity and location and it is feasible or practicable to give them notification.[17] Furthermore, within the context of what is reasonable under the circumstances, the time element is an important factor, for

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[15] At pp. 810-811 of 61 L.Ed.2d.

[16] ". . . there is nothing to construe where there is no ambiguity in the statute." State v. Archuletta, Utah 529 P.2d 911, 912 (1974).

[17] See 20 Words and Phrases, 1979 Supplement, p. 8, "If Possible."

there must be sufficient expedition to provide an effective opportunity for an abortion.[18]

WE CONCUR:

J. ALLAN CROCKETT, Chief Justice

D. FRANK WILKINS, Justice

GORDON R. HALL, Justice

I. DANIEL STEWART, Justice

[18] Bellotti v. Baird, at p. 814 of 61 L.Ed.2d.

SUPREME COURT OF THE UNITED STATES

No. 79-5903

H. L., ETC., APPELLANT

v.

SCOTT M. MATHESON, ET AL.

ON CONSIDERATION of the motion of appellant for leave to proceed herein *in forma pauperis*,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

February 25, 1980

SUPREME COURT OF THE UNITED STATES

No. 79-5903

H. L., ETC., APPELLANT

v.

SCOTT M. MATHESON, ET AL.

APPEAL from the Supreme Court of Utah.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

February 25, 1980

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-5903

H___ L___, on behalf of herself and all others similarly situated,

Plaintiff and Appellant,

vs.

Honorable Scott M. Matheson, individually and in his capacity as Governor of the State of Utah, and Honorable Robert B. Hansen, individually and in his capacity as Attorney General of the State of Utah,

Defendants and Respondents.

On Appeal From the Supreme Court of the State of Utah

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT B. HANSEN
Attorney General
State of Utah

PAUL M. TINKER
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 533-5261

Counsel of Record
Attorneys for
Defendants-Respondents

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-5903

H___ L___, on behalf of herself and all others similarly situated,

Plaintiff and Appellant,

vs.

Honorable Scott M. Matheson, individually and in his capacity as Governor of the State of Utah, and Honorable Robert B. Hansen, individually and in his capacity as Attorney General of the State of Utah,

Defendants and Respondents.

On Appeal From the Supreme Court of the State of Utah

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents submit the following brief in opposition to the Petition for Writ of Certiorari on the ground that it is manifest that the statute in question does not infringe upon the right of privacy as guaranteed by the Fourteenth Amendment to the United States Constitution, nor does it violate any other right protected by the Constitution.

STATEMENT OF THE CASE

A. The Statute

The petition raises the question of the validity of Utah Code Annotated, Section 76-7-304(2)(1978).

This statute provides in pertinent part that "[T]o enable the physician to exercise his best medical judgment, he shall: * * * (2) Notify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed, if she is a minor." The statute provides for notification, if physically possible, of a minor's parents prior to her obtaining an abortion; no requirement of parental consent is contained in the statute.

B. The Proceedings Below

Petitioner, a fifteen year old girl, was informed by her physician that she was pregnant with an unwanted child. She determined to secure an abortion, but did not wish to inform her parents of her condition. Petitioner's physician allegedly would not perform the abortion without providing notice to her parents, because of Utah Code Annotated, Section 76-7-304(2)(1978).

The trial court concluded that the phrase "is possible", in Utah Code Annotated, Section 76-7-304(2)(1978), meant if physically possible and ruled that the statute, as thus interpreted did not violate the Constitution of the United States. The trial court's decision was appealed to the Supreme Court of Utah which unanimously affirmed the judgment of the trial court, declaring that the statute in question did not unconstitutionally restrict a minor's right of privacy as asserted by petitioner.

REASONS FOR DENYING THE WRIT

The Supreme Court of Utah unanimously found the notification requirement of Utah Code Annotated, Section 76-7-304(2)(1978), constitutional, in light of a careful analysis of the relevant case law. Petitioner has not cited cases from this Court dealing with the requirement of notification by the physician to the parents of the minor. All the decisions from this Court cited by petitioner address the abortion issue either in an adult context or in the context of a parental consent requirement. The only reference made in these cases to notification is in the context of notice of judicial proceedings. Bellotti v. Baird, ___ U.S. ___, 61 L.Ed.2d 797 (1979).

The requirement of notification in Utah Code Annotated, Section 76-6-304(2)(1978) is a very minimal requirement which does not violate any constitutional or other right of a minor. Notification does not act as an absolute roadblock to a minor's obtaining an abortion, since it does not require the consent or concurrence of the parents or guardian at any point in the decision-making process. Nothing in the Utah statute requires the parent's consent or anything more than an awareness of the proposed abortion. To leave the parent in total ignorance of the proposed major surgery upon a minor child still within the parents' control and custody would be to ignore totally and completely the fundamental notion of the integrity of the family unit and to disregard entirely the responsibility which parents have for their minor children. Also, the lack of parental involvement in, or at least awareness of, an abortion decision is fundamentally inconsistent

with the requirement of consent of the parent necessary in all other surgical operations on a minor, even granting the special nature of the right to make the ultimate abortion decision not subject to parental or governmental veto. Bonner v. Moran, 126 F.2d 121 (D.C. 1941). The Utah statute strikes an eminently fair balance between a minor and her parents by requiring only a minimal awareness, when possible, on the part of the parent and then leaving the further course of the decision-making process entirely in the hands of the individuals concerned. The Utah Supreme Court in its carefully reasoned decision took pains to illustrate why the Utah statute requiring mere notice does not run afoul the constitutional privacy right of minors as identified by this Court in Bellotti, supra, and in Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976).

A recent case which explores the dilemma of parental rights versus children's rights in the problematical context of the distribution of prescriptive contraceptive services and devices to unemancipated minors in the absence of notice to their parents, is Doe v. Irwin, 441 F.Supp. 1247 (W.D. Mich. 1977). In that case the court reviewed in great detail the law dealing with parental rights to control or influence the behavior of their minor children and held as follows:

> There are, then, three factors which combine here. First, the fact that parental privacy and religious beliefs are implicated. Sceond, the decisions undertaken here by minors who may lack to capacity to make decisions in this area (and who have had only brief consultation with state officials) are within the sphere of decisions which parents are uniquely positioned to evaluate from the standpoint of the

> maturity and capacity of their offspring and to provide the necessary guidance. Finally, and most importantly, these actions are carried out in an atmosphere of secrecy which fails to put parents on notice as to the state's actions relative to their children and has the practical result of depriving parents of alternatives to counteract such actions, if they so desire. Any one of these factors may be significant enough to support the result which this court has reached. The combination of such factors, however, is so serious that I conclude that the parental rights asserted here are seriously invaded by the actions of the defendant Center, taken under color of state law.
>
> Defendants continue to argue that minors have a fundamental constitutional right to obtain contraceptives and that such right would be unduly burdened by a requirement of notification of, and the opportunity for consultation with, the parents of such minors. As I have previously stated, even if there is a fundamental civil right among minors to obtain prescriptive contraceptives, that right need not exist to the total exclusion of any rights of the child's parents. Irwin, supra at 1253-54.

Although the subject of the Irwin case was the availability of contraceptives rather than abortions, the nature of the asserted requirement was identical — notice to the parents prior to the providing of services. The reasoning and case law in the Irwin decision can be applied in toto to the instant case. To assert that the state cannot require notification is to assert that the family relationship between parent and minor child is meaningless.

Additionally this Court itself recently dealt with the fundamental nature of the family relationship and the broad dimensions of parental authority over children, which while not absolute, is far-reaching. This analysis came in the case of Parham v. J.L., ___ U.S. ___, 61 L.Ed2d 101 (1979)(dealing with

involuntary hospitalization of juveniles) in which the Court made the following salient observations, at 118-120:

> Our jurisprudence historically has reflected Western Civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is "the mere creature of the State" and, on the contrary, asserted that parents generally "have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations." Pierce v. Society of Sisters, 268 U.S. 510, 535, 69 L.Ed. 1070, 45 S.Ct. 571, 39 ALR 468 (1925). See also Wisconsin v. Yoder, 406 U.S. 205, 213, 32 L.Ed.2d 15, 92 S.Ct. 1526 (1972); Prince v. Massachusetts, 321 U.S. 158, 166, 88 L.Ed. 645, 64 S.Ct. 438 (1944); Meyer v. Nebraska, 262 U.S. 390, 400, 67 L.Ed. 1042, 43 S.Ct. 625, 29 ALR 1446 (1923). Surely, this includes a "high duty" to recognize symptoms of illness and to seek and follow medical advice. The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children. 1 W. Blackstone, Commentaries *447; 2 Kent, Commentaries on American Law *190.
>
> As with so many other legal presumptions, experience and reality may rebut what the law accepts as a starting point; the incidence of child neglect and abuse cases attests to this. That some parents "may at times be acting against the interests of their child" as was stated in Bartley v. Kremens, 402 F.Supp. 1039, 1047-1048 (E.D. Pa. 1975), vacated, 431 U.S. 119, 52 L.Ed.2d 184, 97 S.Ct. 1709 (1977), creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests. See Rolfe & MacClintock 348-349. The statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition.

* * *

Moreover, the Court recently declared unconstitutional a state statute that granted parents an absolute veto over a minor child's decision to have an abortion. Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 49 L.Ed.2d 788, 96 S.Ct. 2831 (1976). Appellees urge that these precedents limiting the traditional rights of parents, if viewed in the context of the liberty interest of the child and the likelihood of parental abuse, require us to hold that the parents' decision to have a child admitted to a mental hospital must be subjected to an exacting constitutional scrutiny, including a formal, adversary, pre-admission hearing.

Appellees' argument, however, sweeps too broadly. Simply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state. The same characterizations can be made for a tonsillectomy, appendectomy or other medical procedure. Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments.

* * *

Appellees place particular reliance on Planned Parenthood, arguing that its holding indicates how little deference to parents is appropriate when the child is exercising a constitutional right. The basic situation in that case, however, was very different; Planned Parenthood involved an absolute parental veto over the child's ability to obtain an abortion. Parents in Georgia in no sense have an absolute right to commit their children to state mental hospitals; the statute requires the superintendent of each regional hospital to exercise independent judgment as to the child's need for confinement. See P. ____, 61 L.Ed.2d 111, supra.

Likewise in the present case there is no possibility of an absolute parental veto of a child's decision to exercise a fundamental right. There is no possibility of a veto at all. The only result of the Utah statute is the protection of family integrity by precluding a minor in most cases from exercising in total secrecy her constitutionally protected right to choose on abortion.

CONCLUSION

Respondent respectfully submits that it is manifest that the statute in question does not infringe upon the Fourteenth Amendment's guarantee of the right to privacy, and Respondent respectfully urges the court to deny the Petition for Writ of Certiorari.

Dated this 4th day of February, 1980.

RESPECTFULLY SUBMITTED

ROBERT B. HANSEN
Attorney General
State of Utah

Paul M. Tinker

PAUL M. TINKER
Assistant Attorney General

Supreme Court, U. S.
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APR 14 1980
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5903

H_____ L_____, etc.,

Appellant,

v.

SCOTT M. MATHESON, et al.,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

BRIEF FOR APPELLANT

DAVID S. DOLOWITZ
PARSON, BEHLE & LATIMER
79 South State Street
P.O. Box 11898
Salt Lake City, Utah 84147
Attorney for Appellant

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5903

H_____ L_____, on behalf of herself and all others similarly situated,

Appellant,

v.

HONORABLE SCOTT M. MATHESON, individually and in his capacity as Governor of the State of Utah, and HONORABLE ROBERT B. HANSEN, individually and in his capacity as Attorney General of the State of Utah,

Respondents.

APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

BRIEF FOR APPELLANT

OPINIONS BELOW

The opinion of the Supreme Court of the State of Utah (A. 47) is reported at 604 P.2d 907 (Utah 1979). The opinion of the District Court (A. 13) is not reported.

JURISDICTION

The opinion of the Supreme Court of the State of Utah was published on December 6, 1979. (A. 47) Notice of appeal to this Court was filed on the 26th day of December, 1979. (Appendix B to the Jurisdictional Statement) The jurisdiction of this Court is invoked pursuant to the provisions of Section 1257(2) of Title 28 United States Code and probable jurisdiction was noted by this Court on February 25, 1980. (A. 60)

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

1. Section 1, Fourteenth Amendment to the Constitution of the United States of America:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Section 76-7-304(2) Utah Code Annotated 1953:

> "To enable the physician to exercise his best medical judgment, he shall: . . . (2) notify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed if she is a minor or the husband of the woman, if she is married." (Vol. 8B, Utah Code Annotated, 1953, P. 162)

3. Section 76-7-314(3) Utah Code Annotated, 1953:

"A violation of any other provision in this act [part] is a class A misdemeanor." (Vol. 8B, Utah Code Annotated, 1953, P. 164)

4. Section 76-3-204(1) Utah Code Annotated, 1953:

"A person who has been convicted of a misdemeanor may be sentenced to imprisonment as follows: (1) In the case of a class A misdemeanor, for a term not exceeding one year; . . ." (Vol. 8B, Utah Code Annotated, 1953, P. 53)

5. Section 76-3-301(3) Utah Code Annotated, 1953:

"A person who has been convicted of an offense may be sentenced to pay a fine not exceeding: . . . (3) $1,000 when the conviction is of a class A misdemeanor; . . ." (Vol. 8B, Utah Code Annotated, 1953, P. 57-58)

QUESTION PRESENTED FOR REVIEW

DO THE PROVISIONS OF SECTION 76-7-304(2) UTAH CODE ANNOTATED, 1953, WHICH REQUIRE THROUGH THE IMPOSITION OF CRIMINAL SANCTIONS A PHYSICIAN IN THE STATE OF UTAH, PRIOR TO PERFORMING AN ABORTION ON A MINOR, REGARDLESS OF THE DESIRES OF THE MINOR, THE TRIMESTER OF THE MINOR'S PREGNANCY, OR THE MEDICAL JUDGMENT OF THE TREATING PHYSICIAN, TO NOTIFY, IF PHYSICALLY POSSIBLE, THE PARENTS OF THE MINOR, VIOLATE THE MINOR'S RIGHT OF PRIVACY WHICH ENCOMPASSES HER RIGHT TO SECURE AN ABORTION WITHOUT UNWARRANTED INTERFERENCE BY

THE STATE AND HER RIGHT TO A DOCTOR-PATIENT RELATIONSHIP FREE OF IMPROPER REGULATION BY THE STATE IN CONTRAVENTION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

STATEMENT OF THE CASE

This action presents a challenge to the validity under the Fourteenth Amendment to the Constitution of the United States of America to Section 76-7-304(2) Utah Code Annotated 1953 which requires under threat of criminal penalty, a physician in the State of Utah treating a pregnant minor to notify, if physically possible, the parents of that woman before performing an abortion upon her. (A. 47-48) The appellant asserts this statute effects an unwarranted restriction on her exercise of her fundamental right to privacy, that is, to secure an abortioin free of undue regulation by the State and is thus unconstitutional. (A.3-7)

The appellant, a fifteen-year olf unmarried minor, resident of the State of Utah, was residing in the home of her parents when she learned that she was in her first trimester of an undesired pregnancy. (A. 3-5, 24-27) In consultation with both her physician and social worker, she determined that it was in her best medical interest that she be aborted and that her parents not be notified of either her decision or its implementation. (A. 3-5, 24-27) She was also informed that her physician was unwilling to perform the abortion without notifying her parents of her condition and decision though such action was contrary to his best

medical judgment as to appropriate treatment because the provisions of Section 76-7-304(2), Utah Code Annotated 1953, in combination with the provision of Section 76-7-314(3), 76-3-204(1), and 76-3-301(3) Utah Code Annotated 1953 imposed criminal sanctions upon him if he performed the abortion upon appellant without providing the specified parental notification. (A. 3-5, 24-27) Since she did not want to notify her parents of her condition or decision, appellant instituted an action in the Courts of Utah to secure either a construction of Section 76-7-304(2) Utah Code Annotated 1953, that would allow her physician to exercise his best medical judgment and abort her without notifying her parents or an invalidation of that statute. (A. 3-7, 24-27)

The Trial Court construed the statute as requiring appellant's physician to notify her parents before providing the medical care desired by her and deemed necessary medical care by her physician if they could be located and it was possible to do so; he then held that the statute as thus construed was constitutionally valid. (A. 13-14) The judge ruled that if appellant's parents could be located and notified, any special circumstances as might exist which would form the basis for a determination by appellant, her counselor and her physician that her parents should not be notified, would become irrelevant and could not justify an abortion without parental notification. (A. 27-37) Finally, the judge determine that appellant was capable of pursuing this action without the appointment of a guardian ad litem and certified her as the appropriate representative of a class comprised of all pregnant minors similarly situated. (A. 41, 43)

The construction of Section 76-7-304(2) Utah Code Annotated 1953 made by the Trial Court and the

determination that the statute as thus construed was constitutionally valid were affirmed by the Supreme Court of the State of Utah (A. 47-58), 604 P.2d at 908, on the rationale that the opinion of Mr. Justice Powell in *Bellotti v. Baird*, _____ U.S. _____ (1979), was the opinion of only four members of this Court and was thus not binding upon the State of Utah. 604 P.2d at 912 (A. 56) By this appeal, that ruling is challenged by appellant.

ARGUMENT

POINT ONE

THE UTAH STATUTE WHICH REQUIRES A PHYSICIAN UNDER THREAT OF CRIMINAL SANCTION TO NOTIFY, IF IT IS PHYSICALLY POSSIBLE TO DO SO, THE PARENTS OF A PREGNANT MINOR PRIOR TO PERFORMING AN ABORTION UPON THAT MINOR VIOLATES THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BY IMPROPERLY REGULATING AND INFRINGING UPON THE EXERCISE OF THE CONSTITUTIONALLY PROTECTED RIGHT OF PRIVACY OF SAID MINOR.

Appellant, a minor in her first trimester of pregnancy, (A. 4, 24-26) is entitled to the protection of the Fourteenth Amendment guarantee of her right of privacy, which encompasses her right to obtain an abortion free from unwarranted regulation by the State of Utah. *Bellotti v. Baird*, _____ U.S. _____ (1979), *Planned Parenthood of*

Central Missouri v. Danforth, 428 U.S. 52, 74-75 (1976), *Roe v. Wade*, 410 U.S. 113 (1973). The regulation of the exercise of this fundamental right by the State of Utah through enactment and enforcement of Section 76-6-304(2) Utah Code Annotated 1953, is an unwarranted infringement and burden upon the exercise of this constitutionally protected right. The challenged statute which requires the treating physician in Utah to notify, if physically possible, the parents of *all* minors in Utah before aborting them regardless of the desires of the woman, the circumstances in which she finds herself, the trimester of pregnancy or the best medical judgment of the treating physician creates an overbroad, all-inclusive impediment to the exercise of a fundamental right protected by the Constitution of the United States and is thus invalid under the provisions of the Fourteenth Amendment. *Bellotti v. Baird, supra*,[1] *Roe v. Wade, supra.*

The sole basis for any question regarding appellant's challenge to Section 76-7-304(2) Utah Code Annotated 1953, is that it presents the issues inherent in the intersection of three areas of interest which this Court has declared are protected by the Constitution. These are the rights of a minor, her family and the State. The opinion of Justice Powell, speaking for himself, the Chief Justice, Justice Stewart, and Justice Rehnquist in part II of *Bellotti II*, _____ U.S. at _____ (Slip opinion 10-16) articulated the boundaries and proper resolution of those interests. See also *Wynn v. Carey*, 582 F.2d 1375, 1383-1389 (7th Cir. 1978) The particular issue presented to the Court by this case was framed by Justice Powell:

---

[1]The decision of this Court in *Bellotti v. Baird*, ____ U.S. ____ (1979) will hereafter be referred to as *Bellotti II.*

> "But we are concerned here with the constitutional right to seek an abortion. The abortion decision differs in important ways from other decisions that may be made during minority. The need to preserve the constitutional right and the unique nature of the abortion decision, especially when made by a minor, require the State to act with particular sensitivity when it legislates to foster parental involvement in this matter."

_____ U.S. at _____ (Slip opinion 18-19)

This guidance was rejected by Utah and that action requires this Court to invalidate the offending statute. Section 76-7-304(2), Utah Code Annotated 1953 is not sensitive or discrete. It requires the notification of the parents of *all* minors in Utah by the treating physician of the minor's condition and proposed action. (A. 47) It substitutes the judgment of the State for that of the treating physician and the pregnant minor and rejects the exceptions to State regulation recognized by this Court, that is, the mature minor capable of making her own decision without parental involvement, *Bellotti II*, _____ U.S. at _____ (Slip opinion 24-25, 27-28) and where the best interests of the minor are served by her being aborted without parental involvement. *Bellotti II*, _____ U.S. at _____ (Slip opinion 24-25).

Section 76-7-304(2) Utah Code Annotated 1953 as constructed by the Supreme Court of Utah not only rejects the instruction of Mr. Justice Powell, it also ignores the concerns of Justices Brennan, Marshall and Blackmun articulated by Mr. Justice Stevens:

> ". . . The constitutional right to make the abortion decision affords protection to both of the privacy interests recognized in this Court's cases: "One is the individual's interest in avoiding disclosure of personal matters, and another is the interest in independence in

> making certain kinds of important decisions." *Whalen v. Roe*, 429 U.S. 589, 599-600. It is inheent in the right to make the abortion decision that the right may be exercised without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties."

Bellotti II, _____ U.S. at _____ (Slip opinion, Concurring 3).

This Court in ruling unconstitutional the Massachusetts statute evaluated in *Bellotti II* established the rule that a statute effectuating a regulation binding in *all* abortion cases creates an overbroad regulation on the exercise of a constitutionally protected right of privacy of a minor in that State. Any compelling State interest which might be reflected in a carefully drawn statute is clearly absent from Section 76-7-304(2) Utah Code Annotated 1953, which, as construed by the Supreme Court of Utah, requires parental notification in all cases. Not only does it thus create an impermissible burden on the exercise of constitutionally protected rights of a pregnant minor in Utah, it completely overrides and negates the best medical judgment of her treating physician. Thus, as in the case of appellant, where the treating physician in the exercise of his best medical judgment believes his patient should be aborted without parental involvement, his medical judgment is overriden by the statute. If he exercises his best medical judgment he faces criminal sanctions. This over regulation could not be more clear.

In the Courts below appellees have asserted that the challenged statute is a regulation properly enacted by the State of Utah to protect the State's interest in compelling family consultation in mattters so serious as an abortion decision. The courts which have considered this question (except the Utah Supreme Court) have all ruled that such an all encompassing statute cannot be based on this foundation.

Bellotti II, supra, (Slip opinion 10-16, 24-25, 27-28), *Wynn v. Carey*, 582 F.2d 1375, 1383-1390 (7th Cir., 1978), *Margaret S. v. Edwards*, _____ F.Supp. _____ (E.D.La., 1980) (Judge Collins, Civil Action No. 78-2765, opinion at PP 21-27), *Akron Center for Reproductive Health Inc. v. City of Akron*, 479 F.Supp. 1172, 1201-02 (N.D. Ohio 1979), *Women's Community Health Center, Inc. v. Cohen*, 477 F.Supp. 542, 548-48 (D.Main 1979), *Baird v. Bellotti*, 450 F.Supp. 997, 1000-1003 (D.Mass. 1978); cf. *Doe v. Irwin*, _____ F.2d _____ 48 U.S.L.W. 2587 (6th Cir. 1980). This Court declared such all inclusive regulation was void as failing to recognize exceptions constitutionally required for the mature minor and the minor whose best interest requires parental exclusion. *Bellotti II*, _____ U.S. at _____ (Slip opinion 24-25, 27-28).

The statute itself demonstrates this assertion is an afterthought. It states *nothing* about protecting family interests. It provides that it is enacted to enable the treating physician to ". . . exercise his best medical judgment," Section 76-7-304 Utah Code Annotated 1953, and it is located in the Criminal Code of the State of Utah, not in the medical license or family law statutes.

If, however, the statute is considered (despite its provisions and location) to be an attempt by the State of Utah, to protect the family, or to advance the interests of the State by protecting the family, it is too broad and unnecessary.

> "Ostensibly, the notice requirement furthers the State's interest in insuring that parents are given the opportunity to participate in an important and potentially traumatic decision in the life of their minor daughter, thus promoting family dialogue and harmony. However, any state interest in encouraging consultation between the daughter who is seeking an abortion and her parents is not necessarily achieved by the notice

> requirement because merely giving notice to the parents does not assure that there will be any meaningful dialogue. In many cases the notice requirement will cause family disharmony because it will inform parents who may oppose their daughter obtaining an abortion, yet, those parents will be legally powerless to prevent their daughter from obtainin an abortion."

Margaret S. v. Edwards, _____ F. Supp. at _____ (Opinion 24-25).

In those families enjoying good parent-child relationships, such State interference is unnecessary as well as unconstitutional. It is in those families where a pregnant minor correctly fears that parental notification is not in her best interest that protection of her constitutional interests require invalidation of the infringment on the exercise of a constitutionally protected right effectuated by the challenged statute. Such a minor is injured by the statute which does not protect either her or the family:

> ". . . there are a variety of recognized reasons why it would be to a minor's best interests for one or both of her parents to be kept in ignorance of her pregnancy. Parents, physically or emotionally unwell, may be injured by the shock, thus causing the minor deep feelings of guilt. Some parents are child abusers; others at least may become actively hostile on such disclosure. Defendants concede, and the evidence shows, that an appreciable number of parents are not supportive. These include not only those who would inflict physical harm, but parents who would insist on an undesired marriage, or on continuance of the pregnancy as punishment. We may suspect, in addition, that there are parents who would obstruct, and perhaps altogether prevent, the minor's right to go to court. This would seem but a normal reaction of persons who hold strong anti-abortion convictions."

Baird v. Bellotti, 450 F. Supp. 997, 1001 (D.Mass. 1978). See also *Baird v. Bellotti*, 393 F.Supp. 847, 850 (D.Mass. 1975).

This is not a hypothetical discussion; the cases arising under Section 76-7-304(2) Utah Code Annotated 1953 as well as those arising in other jurisdictions, *Bellotti II, Wynn v. Carey, supra, Margaret S. v. Edwards, supra, Akron Center for Reproductive Health, Inc. v. City of Akron, supra,* and *Women's Community Health Center, Inc. v. Cohen, supra,* demonstrate the scope of the problem. In the instant matter, the plaintiff is a minor who was residing with her parents when she discovered her condition. (A. 3-5, 24-26) She did not wish her parents to be notified of her condition or decision.[2] (A. 3-5, 24-26) The Utah statute challenged in this appeal prohibited appellant's physician from performing an abortion upon her without notifying her parents despite the fact that both he and the social worker with whom appellant consulted believed her parents should not be notified of her condition, decision or proposed treatment. (A. 3-5, 24-26) Thus appellant's belief and desires were supported by the professional judgment of her physician yet he was prevented from exercising his best medical judgment by the challenged act. Not only did Section 76-7-304 Utah Code Annotated 1953, impinge on appellant's exercise of her constitutional right of privacy, it prevented the effectuation of the best medical judgment of her treating physician.

This same statute prohibited the plaintiff in the case *L_____ R_____ v. Hansen*, (Civil No. C-80-0078J) currently pending in the United States District Court for the

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[2]In this regard, her situation is identical to the plaintiff Mary Moe whose case was considered by this Court in *Bellotti II*____ U.S. at____ (Slip opinion P. 3).

District of Utah, from securing an abortion without prior notification of her parents. (Appendix to Brief 1-6) L_____ R_____ is a 17-year old woman who had been residing on her own for approximately one year prior to the filing of the action challenging Section 76-7-304(2) Utah Code Annotated 1953. She had been asked to leave the home of her mother, had done so and been completely self-supporting and managing her own affairs during that year. She desired to obtain an abortion without her parents being notified because she believed that if she did inform her parents of her condition and her decision, it would cause a deterioration in the relationship with her parents which she did not wish to occur. (Appendix to Brief 4-5). She was compelled to go to court to challenge the Utah act to obtain what the Constitution of the United States guaranteed that she should have, that is, an abortion without the notification of her parents. (Appendix to Brief 1-6) Judge Jenkins found her to be a mature minor, competent to make her own decision, possessed of the ability to proceed on her own, yet she could not exercise her right to proceed on her own absent the injunction to the statute which he granted. (Appendix to Brief 1-2, 5-6).

The Utah statute challenged in the instant action had equal application to a mature minor living on her own who had been managing her own affairs for a year and an unmarried minor residing at home with her parents whose physician and social worker believed in the exercise of their best professional judgment should be aborted without notification of her parents. Each of these women had consulted with their treating physician, determined that if was in their best medical interest to obtain an abortion without the involvement of their parents, yet neither could do so because the statute challenged in this action effected an unwarranted

regulation of their constitutional right of privacy. (A. 3-5, 24-26, Appendix to Brief, 1-6). An equally obvious situation would be that of a minor whose pregnancy was the result of an incestual relationship which would be encompassed by Section 76-7-304(2) Utah Code Annotated 1953.

The overbreadth of the Utah statute could not be made more clear. Both H_____ L_____ and L_____ R_____ were determined sufficiently mature to proceed without the appointment of a guardian (A. 41, 43, Appendix to Brief 5), and L_____ R_____ was found mature enough to consent to her own abortion.[3] (Appendix to Brief 5). Despite the competency of each woman, the fact that each was in her first trimester of pregnancy (A. 3-4, 24-26, Appendix to Brief 4), the best professional judgment of the treating professionals, and the fact circumstances of the women, the challenged statute prohibited an abortion absent prior parental notification. In each case, the exercise of the constitutional rights of the woman was unduly burdened by the challenged statute which ignores the analysis and guidance of this Court:

> "The pregnant minor's options are much different from those facing a minor in other situations, such as deciding whether to marry. A minor not permitted to marry before the age of majority is required simply to postpone her decision. She and her intended spouse may preserve the opportunity for later marriage should they continue to desire it. A pregnant adolescent, however, cannot preserve for long the possibility of aborting, which effectively expires in a matter of weeks from the onset of pregnancy.
>
> "Moreover, the potentially severe detriment facing a pregnant woman, see *Roe v. Wade*, 410 U.S. at 153, is not mitigated by her minority. Indeed, considering her

[3]This issue was never reached by Judge Winder regarding H____ L____ because of his ruling regarding the statute.

probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor. In addition, the fact of having a child brings with it adult legal responsibility, for parenthood, like attainment of the age of majority, is one of the traditional criteria for the termination of the legal disabilities of minority. *In sum, there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible.*" (Emphasis added)

_____ U.S. _____ at _____ (Slip opinion 19)

Section 76-7-304(2) Utah Code Annotated 1953 as interpreted by the Supreme Court of the State of Utah, overrides the right of privacy of a pregnant minor in the State of Utah and creates a unwarranted burden upon the exercise of her constitutional right of privacy, that is, to be free to obtain an abortion without undue interference by the State. This unconstitutional regulation must be eliminated by this Court.

POINT TWO

THE UTAH STATUTE WHICH REQUIRES A PHYSICIAN UNDER THREAT OF CRIMINAL PENALTY TO NOTIFY, IF POSSIBLE, THE PARENTS OF A MINOR WHO HAS CONSULTED HIM FOR AN ABORTION PRIOR TO PERFORMING THAT ABORTION IS A REGULATION WHICH IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION UNLAWFULLY IMPINGES ON A MINOR'S RIGHT TO SECURE MEDICALLY NECESSARY TREATMENT

FROM HER TREATING PHYSICIAN WHO, IN THE EXERCISE OF HIS BEST MEDICAL JUDGMENT, DOES NOT BELIEVE SUCH NOTIFICATION SHOULD TAKE PLACE.

This Court ruled that in the first trimester of pregnancy a woman has the right to consult with an attending physician who:

> "... in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State."

Roe v. Wade, 410 U.S. 113 at 163. You went on to hold in the companion case of *Doe v. Bolton,* 410 U.S. 179, 192, (1973), that a doctor in deciding whether or not to perform an abortion must be free to treat his patient through the normal exercise of his best medical judgment and:

> "... the medical judgment may be exercised in light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman." 410 U.S. at 191.

Then, this Court declared that where:

> "The woman's right to receive medical care in accordance with her licensed physician's best medical judgment and the physician's right to administer it are substantially limited by this statutorily imposed overview."

Doe v. Bolton 410 U.S. at 197, the statute imposing such an impediment on and burden to the exercise of the right of privacy was unconstitutional.

The rationale of this rule was restated three years later in *Singleton v. Wulff*, 428 U.S. 106 (1976) when this Court declared:

> "The closeness of the relationship is patent, as it was in *Griswold* and in *Doe*. *A woman cannot safely secure an abortion without the aid of a physician*, . . . The woman's exercise of her right to an abortion, whatever its dimension, is, therefore, necessarily at stake here. Moreover, the constitutionally protected abortion decision is one in which the physicial in intimately involved. See *Roe v. Wade*, 410 U.S. at 153-156, 35 L.Ed.2d 147, 93 S.Ct. 705".

428 U.S. at 117.

This right of a patient to be treated by her physician without an unconstitutional burden being imposed by the State through undue regulation by the State was recently re-examined in *Colautti v. Franklin*, 439 U.S. 379, (1979) where, following up on concepts articulated in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), *Roe v. Wade, supra*, and *Doe v. Bolton, supra*, this Court ruled statutes which unduly regulated the exercise by a physician of his best medical judgment were unconstitutional, 428 U.S. at 63-65.

This Court has consistantly scrutinized with great care those statutes which impose criminal sanctions on a physician for treating his patient in abortion cases where criminal sanctions are imposed on the exercise of his best medical judgment. *Roe v. Wade, supra, Doe v. Bolton, supra, Planned Parenthood of Central Missouri v. Danforth, supra*, and *Colautti v. Franklin, supra*. This is recognition of the pragmatic consideration that the right to an

abortion means nothing if the assistance, guidance and services of a treating physician are taken from the woman seeking to exercise her constitutionally protected right. *Singleton v. Wulff,* 428 U.S. 106 (1976).

The sole basis on which the state might have the right to regulate this relationship is the minority of the members of the class represented by appellant. However, as pointed out in Point I of this Brief, the challenged statute prohibits the exercise of a physician's best medical judgment where he believes in light of all factors that the minor's parental involvement is contrary to her best interest. This regulation is not sensitive, narrow or reflective of the right of privacy of a pregnant minor. It is broad and all-encompassing. It overrides the judgment of the treating physician in all cases including where the mature minor, exercising her constitutional right to an abortion seeks treatment without parental involvement and where the best interest of the minor dictates parental exclusion. *Bellotti II,* ____ U.S. at ____ (Slip Opinion 24-25, 27-28, slip concurring opinion 3).

This prohibition upon an unlawful statutory intrusion on the doctor-patient relationship by the improper regulation of the exercise by a woman of her right of privacy was rejected by the Supreme Court of the State of Utah when it ruled:

> "... the consulting physician must notify the parents, if under the circumstances, in the exercise of reasonable diligence, he can assertain their identity and location and it is feasible or practicable to give them notification. Furthermore, within the context of what is reasonable under the circumstances, the time element is an important factor for there must be sufficient expedition to provide an effective opportunity for an abortion."

604 P.2d at 913 (A. 57-58).

In a case such as that of appellant, where she, her physician and her social work counselor all feel it is contrary

to her best interests to notify her parents of her condition, decision and intended treatment, such regulation by the State upon the exercise by the physician of his best medical judgment is clearly unwarranted. This is equally true for L____ R____ a mature minor judged capable of making her own decision and whose belief is that providing such notice will cause a serious deterioration in the relationship she has with her parents. It would be true for the minor victim of an incestuary relationship who had consulted a physician for an abortion. The challenged statute takes the means of exercising the right to an abortion away from a pregnant minor in Utah; it deprives her of a treating physician.

This unwarranted restriction is effectuated not by inhibiting the minor in exercising her rights, it is imposed by threatening her treating physician with criminal sanctions. It overrides the desires, belief and knowledge of the minor regarding her own best interests and negates the best medical judgment of the treating physician where he believes the abortion should be performed without parental involvement. It makes a physician who this Court has declared must be free to exercise his best medical judgment, *Roe v. Wade, supra, Doe v. Bolton, supra,* disregard his judgment where he believes it is in the best medical interests of his patient not to notify her parents. The Utah statutory scheme provides for no exceptions unless it is physically not possible within the time frame involved to notify the parents of the pregnant minor. This clearly impinges upon the doctor-patient relationship and effectively deprives a minor in the State of Utah seeking an abortion of the sole means that she can legally use to obtain one; that is, her treating physician's services. It is an unconstitutional regulation of constitutionally protected rights which must be invalidated by this Court.

CONCLUSION

The provisions of Section 76-7-304(2) Utah Code Annotated 1953 violate the Fourteenth Amendment to the Constitution of the United States. As construed by the Courts of the State of Utah, the statute unlawfully deprives a pregnant minor in the State of Utah, even in her first trimester of pregnancy, of her right to secure an abortion free from unwarranted State interference. As such, this Court should rule that statute unconstitutional, remand this case to the Supreme Court of the State of Utah with directions to enter judgment in accordance with the opinion of this Court and direct that Court to remand this matter to a Trial Court in the State of Utah for the determination of appropriate costs and attorneys fees under the provisions of Section 1988 of Title 42 United States Code (A. 6-7).

/s/ David S. Dolowitz
DAVID S. DOLOWITZ
Attorney for Appellant

APPENDIX A

DAVID S. DOLOWITZ
of and for
PARSONS, BEHLE & LATIMER
Attorneys for Plaintiff
79 South State Street
P. O. Box 11898
Salt Lake City, Utah 84147
Telephone: 532-1234

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

* * * * * * * * *

L____ R____, on behalf of herself and all other persons similarly situated,	
Plaintiff,	ORDER-Filed Feb. 8, 1980
vs.	
ROBERT B. HANSEN, individually and in his capacity as Attorney General of the State of Utah, and HONORABLE	Civil No. C-80-0078J

SCOTT M. MATHESON, individually and in his capacity as Governor of the State of Utah,

Defendants.

* * * * * * * *

The above-entitled matter came duly before the above-entitled Court, the Honorable Bruce S. Jenkins presiding, for consideration of the Motion of the plaintiff for the entry of a Temporary Restraining Order and/or Preliminary Injunction on Wednesday, the 6th day of February, 1980. Prior to said hearing, the Court had heard testimony from the plaintiff and now, having heard and considered the arguments of counsel and taken the matter under advisement to review and consider the written authority submitted by counsel for the respective parties, the oral and written arguments of the parties and research regarding the questions presented and having considered the urgency for the plaintiff of rendering an expedited decision, and having previously entered Findings of Fact and Conclusions of Law in this matter:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Defendants, their agents, employees and those working in concert with them and under their direction are hereby ordered enjoined and prohibited from enforcing the provisions of Section 76-7-304(2) Utah Code Annotated, 1953, at this time insofar as they apply to the plaintiff, L____ R____ , and her treating physician.

DATED this 8 day of February, 1980.
BY THE COURT:

/s/ Bruce S. Jenkins
BRUCE S. JENKINS
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

/s/ David S. Dolowitz
DAVID S. DOLOWITZ
Attorney for Plaintiff

/s/ Paul M. Tinker
PAUL M. TINKER
Assistant Attorney General
Attorney for Defendants

APPENDIX B

DAVID S. DOLOWITZ
of and for
PARSONS, BEHLE & LATIMER
Attorneys for Plaintiff
79 South State Street
P. O. Box 11898
Salt Lake City, Utah 84147
Telephone: 532-1234

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

* * * * * * * * *

L____ R____, on behalf of herself and all other persons similarly situated,	)
Plaintiff,	) FINDINGS OF FACT AND
vs.	) CONCLUSIONS OF LAW—
ROBERT B. HANSEN, individually and in his capacity as Attorney General of the State of Utah, and HONORABLE	) Filed Feb. 8, 1980
	) Civil No. C-80-0078J

SCOTT M. MATHESON, individually and in his capacity as Governor of the State of Utah,

Defendants.

* * * * * * * *

The above-entitled matter came duly before the above-entitled Court, the Honorable Bruce S. Jenkins presiding, for consideration of the Motion of the plaintiff for the entry of a Temporary Restraining Order and/or Preliminary Injunction on Wednesday, the 6th day of February, 1980. Prior to said hearing, the Court had heard testimony from the plaintiff and now, having heard and considered the arguments of counsel and taken the matter under advisement to review and consider the written authority submitted by counsel for the respective parties, the oral and written arguments of the parties and research regarding the questions presented and having considered the urgency for the plaintiff of rendering an expedited decision, hereby makes and enters the following:

FINDINGS OF FACT

1. The plaintiff has asserted a claim in this Court challenging the validity of Section 76-7-304(2) Utah Code Annotated, 1953, under the provisions of 28 U.S.C. Section 1343, 42 U.S.C. Section 1983, and the Fourteenth Amendment to the Constitution of the United States.

2. The plaintiff is a resident of the State of Utah, seventeen years old, unmarried and currently in her first trimester of pregnancy.

3. The plaintiff is living by herself, supporting herself and has done so for the last year.

4. The plaintiff left the home of her mother after having been invited to do so and since leaving said home has not been supported by or received any assistance from her mother.

5. The plaintiff's father does not live in the State of Utah and has not provided any support to the plaintiff since she moved from the home of her mother.

6. The plaintiff consulted with her physician, social workers, her attorney and those persons who have a meaningful relationship with her as to her current situation and the alternative courses of action available to her.

7. The plaintiff does not desire to inform or have her parents informed of her current condition or the medical treatment she is seeking as is required by the provisions of Section 76-7-304(2) Utah Code Annotated, 1953.

8. The physician who is currently providing treatment to the plaintiff will not abort her for fear of being prosecuted pursuant to the provisions of Section 76-7-304(2) Utah Code Annotated, 1953, and the concomitant applicable criminal provisions without informing the parents of the plaintiff of the operation which should be performed upon the plaintiff.

9. If the plaintiff informed her mother of her condition or her decision, she believes it could cause a serious deterioration of their relationship.

From the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this matter.

2. The plaintiff is an emancipated minor who is a mature individual who is capable of understanding her condition and making an informed decision which she has done after carefully considering the alternatives available to her and consulting the persons with whom she felt she should consult prior to making the decision to have an abortion.

3. The provisions of Section 76-7-304(2) Utah Code Annotated, 1953, are either unconstitutional as applied to the plaintiff in that they unlawfully infringe upon the exercise of her right of privacy as guaranteed by the Fourteenth Amendment to the Constitution or fail to apply to her as an emancipated minor.

4. It is probable that the plaintiff will be successful in her challenge to the provisions of Section 76-7-304(2) Utah Code Annotated, 1953, either because said statute will be determined unconstitutional as applied to her, a mature and emancipated minor, or because said statute does not apply to a mature emancipated minor.

5. The plaintiff will suffer immediate and irreparable injury if the defendants are not enjoined from enforcing the provisions of Section 76-7-304(2) Utah Code Annotated, 1953, as to the plaintiff.

6. The Court should make no determination at this time as to whether or not this is an appropriate class action and whether or not the plaintiff is an appropriate representative of a potential class.

7. The defendants should be enjoined and prohibited from enforcing the provisions of Section 76-7-304(2) Utah Code Annotated, 1953, at this time insofar as they apply to the plaintiff.

DATED this 8 day of February, 1980.

BY THE COURT:

/s/ Bruce S. Jenkins
BRUCE S. JENKINS
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

/s/ David S. Dolowitz
DAVID S. DOLOWITZ
Attorney for Plaintiff

/s/ Paul M. Tinker
PAUL M. TINKER
Assistant Attorney General
Attorney for Defendants

Supreme Court, U.S.
FILED
MAY 21 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5903

H_____L_____, etc.

Appellant,

v.

SCOTT M. MATHESON, et al.,

Appellees

APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

BRIEF FOR APPELLEES

ROBERT B. HANSEN
Attorney General
PAUL M. TINKER
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Attorney for Appellees

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IN THE

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H_____L_____, etc.

Appellant,

v.

SCOTT M. MATHESON, et al.,

Appellees

APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

BRIEF FOR APPELLEES

SUMMARY OF ARGUMENT

The statute at issue in this case merely requires that a physician who is about to perform an abortion on a minor girl give notice to her parents, if possible, before the abortion is performed. This requirement does not improperly regulate or infringe upon the exercise of a protected privacy right, nor does it unduly burden the exercise of such a right. Rather it is a minimal requirement which does not violate any right of the minor or of her physician.

The requirement of notice — insuring mere knowledge on the part of the parents — is the most minimal requirement that could be imposed. This Court has previously said that even consent requirements may be imposed under certain limitations, but the Utah statute does not even go that far. If mere notice cannot be required, then the abortion choice for a minor will have been elevated to an absolute right against which no parental or familial right could ever be asserted, in contradiction to a longstanding body of jruisprudence which recognizes the integrity of the nuclear family as the basis of our society.

Without this minimal statutory protection of the family and parental relationship, a significant interest of parents can be terminated without the barest element of due process, namely notice, a result which would be unthinkable in almost any other context. The statute however, does not, indeed cannot, *require* parental involvement in the minor's decision-making; it can merely encourage such participation. A statute which merely encourages such involvement cannot be held unconstitutional under the prior rulings of this Court. While the statute may not actually further a goal of parental involvement in every case, that alone does not make the statute constitutionally deficient, and the wisdom or social desirability of such a statute is a matter which must be left to the legislature to decide.

Lower courts which have invalidated notice-only abortion statutes in other cases have either misunderstood previous rulings of this Court concerning consent requirements, or have sought to substitute their views of the wisdom of such laws for the views of the legislature. Additionally, such statutory schemes in other states were more complex and more burdensome than the Utah requirement.

There is a vast difference between a requirement that the state not impose directly or indirectly a veto power over an abortion decision, and the requirement sought by Appellant that the state seek to remove all potential negative consequences, even the psychological ones, from the path of a person seeking an abortion. This is especially true, when the consequences contemplated by Appellant are anticipatory only and will result, if at all, from private action by those persons with whom she shares an intimate family relationship. The privacy right identified in the abortion context must be tempered by these considerations when the person seeking an abortion is an unemcipated minor living at home.

The state does not here delegate any power to the family to prevent abortions. Rather it merely safeguards a reserved right which parents have to know of the important activities of their children by attempting to prevent a denial of the parental rights through deception.

In providing this security the statute serves foremost to preserve a right of families, but in so doing it furthers various state interests as well which justify the slight infringement, if any, on the privacy right of the minor. The principal interest is in maintaining family integrity as the basic social unit and decision-making body of society. The regulation of one aspect of the practice of medicine to accomplish this purpose is a logical and proper method of furthering this interest in the abortion context. Additional-

ly, the encouragement of parental consultation with a minor contemplating an abortion, even though it cannot be compelled by the state, is a legitimate state interest which is furthered by the statute. Also the state furthers an important interest in the enforcement of its criminal laws against improper sexual activity with minors.

Appellant has included in her brief certain material from the record of another case still pending in a lower court pertaining to the application of the statute to an emancipated minor. This presents a different issue from the one presently before the court and should be disregarded.

ARGUMENT

I

THE STATUTE AT ISSUE DOES NOT IMPROPERLY REGULATE OR INFRINGE UPON THE EXERCISE OF A PROTECTED PRIVACY RIGHT BY A MINOR, BUT RATHER CONSTITUTES A DE MINIMIS REQUIREMENT THAT DOES NOT UNDULY BURDEN EITHER THE MINOR OR HER PHYSICIAN.

A. The statute requires mere notice and nothing further - the most minimal burden that could be imposed.

The statute challenged here provides as follows, in the context of a section regulating abortions in the chapter, "Offenses aginst the Family" in the Utah Criminal Code:

> 76-7-304. *Considerations by physician — Notice to minor's parents or guardian or married woman's husband.* — To enable the physician to exercise his best medica! judgment, he shall:
>
> (1) Consider all factors relevant to the well-being of the woman upon whom the abortion is to be performed including, but not limited to,
>
> (a) Her physical, emotional and psychological health and safety,
>
> (b) Her age,
>
> (c) Her familial situation.
>
> (2) Notify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed, if she is a minor or the husband of the woman, if she is married.

This is an absolutely minimal requirement. It does not place any roadblocks in the way of a girl who has chosen to exercise her constitutionally-protected right to secure an abortion from a willing physician. It does not confer a veto power, either absolute or otherwise, on any third person. It is not unconstitutional according to any previous ruling of the Court. In order for Appellant to prevail here, this Court will have to find, as it has never previously found, that a state may not protect the integrity of the family relationship by requiring a minimal notification of parents *when possible* of an intended major surgical procedure to be performed on their minor daughter over whom they exercise care and custody. Such a ruling would not only be contrary to the entire course of jurisprudence relating to the sanctity of the family relationship, but it would also be inconsistent with what this Court has recently stated about the power of states to go so far as to impose even *consent* requirements for minors' abortions under certain limited circumstances. *Bellotti v. Baird*,____U.S.____, (Slip opinion, 20-21) (1979), (hereinafter *Bellotti II.)*

The burden, if any, imposed by this statute upon the exercise of an abortion decision by a pregnant minor is *de minimis*. On the other hand, the invasion of the rights of parents when their minor children are subjected by third parties to major surgery in total secrecy is substantial. Therefore, unless the abortion right is to be exalted, in the degree of protection afforded it, above almost any other right known in our society, including those explicitly stated in the Constitution, the challenged statute must be upheld.

Appellant suggests (Brief, p. 16-17) that because the statute in question also imposes limitations on the treating physician, it violates constitutional requirements identified in *Roe v. Wade*, 410 U.S. 113 at 163, and *Doe v. Bolton*, 410 U.S. 179 at 192 (1973), about the role of the doctor in the

abortion decision-making process. But those cases did not consider the peculiar circumstances involved when an unemancipated minor seeks an abortion. The entire thrust of the Utah statute is consistent with the historical reality that doctors have had less autonomy in directly exercising their professional judgment with respect to minors than they have with respect to adults. The limitation, if any, on the physician under the Utah scheme, is the most minimal limitation that could be created while still recognizing any interest at all on the part of the parents for their minor daughter. It is merely a requirement that the doctor notify the parents. All of the details as to how he notifies them, whether he engages in any further consultation with them, and whether he takes any information which they may give into account, are left to the exercise of his best medical judgment.

B. The statute does not impinge on an abortion decision, but even if it does it can be justified by a rational relationship to a legitimate state purpose and it does not unduly burden the decision.

The basic formula for evaluating statutes concerning abortion has evolved since 1973. In *Roe v. Wade, supra,* the Court held that the constitutional "right to privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* at 153. It was explained that this right, although fundamental, "is not unqualified and must be considered against important state interests in regulation." *Id.* at 154. The Court stated that "regulation limiting . . .(fundamental) rights may be justified only by a 'compelling state interest' . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." *Id.* at 155 (citations omitted). While the State has a valid interest in the mother's health, which becomes compelling after the

first trimester of pregnancy, and also a valid interest in the protection of a potential human life, which becomes compelling when the fetus becomes viable, (usually in the third trimester of pregnancy), *Id.* at 163-64, the Court concluded that during the first trimester "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician," *Id.* at 164, "free of interference by the State." *Id.* at 163.

Various decisions subsequent to *Roe* make clear that not all regulation of first trimester abortions is impermissible. If the challenged state action does not impinge upon a woman's decision to have an abortion and does not place obstacles in the path of effectuating that decision, the regulation need only be justified by a rational relationship to a legitimate state purpose. *Maher v. Roe,* 432 U.S. 464, 478-80 (1977) (limits on state funding for "non-therapeutic" abortion permissible). *Menillo v. Connecticut,* 423 U.S. 9, 11 (1975) (per curiam) (state criminal statute proscribing unlicensed physician from performing abortions does not impinge on abortion decision). If the regulation does impinge upon a woman's abortion decision or the means of effectuating it, the regulation still "is not unconstitutional unless it *unduly burdens* the right to seek an abortion." *Bellotti v. Baird,* 428 U.S. 132, 147 (1976) *(Bellotti I)* (emphasis added). See also *Maher v. Roe, supra* at 473-74. If the regulation unduly burdens the abortion decision, it must be justified by a compelling state interest. *Carey v. Population Services International,* 431 U.S. 678, 686, 688 (1977); *Roe v. Wade, supra* at 155. If, on the other hand, the regulation impinges upon the abortion decision without unduly burdening it, it must be sustained if it reasonably furthers a proper state purpose. *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52 at 65-67, 80-81 (1976). Thus, "(a)s *Whalen (v. Roe,* 429 U.S. 589 (1977)) makes clear, the right in *Roe v. Wade* can be understood only by considering both the woman's interest

and the nature of the state's interference with it." *Maher v. Roe, supra* at 473.

While there is no question that the Utah statute applies to first trimester abortions as well as all others, Appellees here do not concede that the challenged statute impinges on a woman's decision to have an abortion or that it places obstacles in the path of effectuating such a decision. But even if it does, the statute can be justified by a rational relationship to a legitimate state purpose; and the legitimate state purpose significantly transcends the limited area of abortion decision-making.

Furthermore even if the statute should be held to impinge on an abortion decision or to place obstacles in the path of effectuating such a decision, it still does not *unduly burden* the decision and may thus be upheld without demonstrating a compelling state interest.

C. Absent this statute a significant parental interest may by nullified without even the basic due process element of notice, elevating abortion choice unwarrantedly to an absolute right.

One must stretch the imagination to an extraordinary degree to conjure up a situation where another important right or interest might be so summarily disregarded as appellant would have this court do by holding that parents need not ordinarily even be informed of major medical treatment to be performed on their minor daughter. The notion that a major interest of a person may be subverted or nullified without even the merest notice to the person so affected is a stranger to our jurisprudence. Even in this action, although the court below did not authorize the minor to obtain the abortion, it allowed her to proceed in court without notice to her parents. (A. 36). If this Court now rules that parents may not be notified

under Utah's statutory scheme when their daughter seeks an abortion, the Court will have effectively terminated the parental rights of an entire class of persons vitally concerned about the welfare of their daughters and will have done so without even the pretense of notice or due process for that class of persons.

The Court has been invited to indulge in all manner of speculation, nowhere supported in the record, to the effect that many parents generally and some parents in particular, do not act in their children's best interests when informed of a contemplated abortion. But where is the opportunity, heretofore required seemingly by axiom in our jurisprudence, for these very parents to respond to the allegations of their minor children and to say how they in fact will respond to the notification of a proposed abortion? Indeed by the very posture in which she has proceeded in the courts, appellant has effectively precluded her own parents and those like them from making a response to her allegations and by any rational standard has denied them what would otherwise be regarded as a most minimal due process of law.

If Appellant's reasoning in this case is converted into binding constitutional doctrine, then the same reasoning would ultimately require holding that notice to defendants in divorce cases is constitutionally impermissible because it can be shown, or surmised at least, that *some* defendants become violently abusive and visit bodily harm upon their spouses. Of course, this Court has never had occasion to hold that divorce *per se* is a fundamental right in the same sense as abortion has been found to be such (largely because divorce has not historically been prohibited in the way abortion was), but from the case regarding access to the courts for divorce, *Boddie v. Connecticut*, 401 U.S. 371 (1971), it is clear that the opportunity to seek a divorce is a vital interest which must be protected. In any case, the

parallel with respect to notification of a person potentially disadvantaged or distressed by the exercise of an important right by another is clear, and it would be a constitutional absurdity to suggest that the potentially negative (or even violent or abusive) reaction of the person so notified justifies proceeding to effectively terminate his interest while keeping him in total ignorance of the action. But this is precisely what Appellant suggests with respect to her action to exclude parents from any knowledge of her abortion.

Likewise the issue of how much process is due in the matter of terminating parental rights in the context of child abuse or neglect has been much litigated, *Moore v. Sims*,____U.S.____, (1979); *Doe v. Delware*, Docket No. 79-5932, (Jurisdiction noted March 24, 1980), but there is no reasonable suggestion that such a termination may be accomplished in total unawareness on the part of the parents. This is true even though a plausible argument can be made that initiation of proceedings to terminate parental rights may trigger violent or otherwise undesirable behavior on the part of some parents.

These comparisons should alert the Court to the serious dangers of elevating the right to choose an abortion above any or all other protected rights. While it is settled that the right to choose an abortion is a fundamental privacy right, protected by the Constitution, *Roe v. Wade*, 410 U.S. 113 (1973), *Doe v. Bolton*, 410 U.S. 179 (1973), it has never been held that this right is absolute or that it must necessarily prevail over every imaginable competing interest. In *Wade*, the Court said, "The privacy right involved, therefore, cannot be said to be absolute." 410 U.S. at 154.

Our pluralistic society and government hardly permit any single right to be regarded as absolute, yet Appellant desires this Court to identify precisely such an absolute

right for a minor to choose an abortion. The proposed right collides unavoidably with an absolutely minimal, indeed irreducible, right of the parent to know of the proposed operation on their child. This is the right which the state seeks through its statutory scheme, to preserve in the context of a viable family structure and decision-making unit.

If the state cannot require mere notice to the parents, then it is difficult to conceive of any family interest that could ever be asserted vis-ā-vis the abortion right. If a medical doctor cannot be required by the state to inform parents of a serious medical procedure to be performed upon their minor daughter, it is hard to believe that the state could ever assert against the abortion right any influence whatsoever in support of parents on behalf of their children. The abortion right would indeed have become an absolute right.

But even the far-reaching decisions of this Court do not require such a result. This Court has in fact suggested that a state may indeed, "require a pregnant minor to obtain one or both parents' consent to an abortion," if it also provides "an alternative procedure whereby authorization for the abortion can be obtained." It is even hinted that such an alternative procedure might involve the juvenile court or an administrative agency or officer. *Bellotti II, supra,* (Slip opinion, 20, n. 22).

Utah, however, does not go so far as to require anyone's consent (except the pregnant minor herself) for an abortion. Utah merely requires the minor's parents to be notified, and does not so much as place a time limit on how soon after the notification an abortion may be performed.

Surely it is not logical to argue that the requirement of mere notification is somehow more invasive of the privacy right involved than a requirement that consent in fact be obtained either from the parents themselves or alternative-

ly from some third party who is a stranger to the child and to her circumstances, and who can probably be approached only through some bureaucratic process which further compounds the invasion of privacy. Utah's requirement is a *de minimis* requirement, even in the light of *Bellotti II* upon which Appellant primarily relies. The Massachusetts statute considered in *Bellotti* was significantly more burdensome than Utah's requirement because it was actually a consent requirement where notice to parents became involved as one of the steps along a path toward obtaining consent. The language in *Bellotti II* regarding notice should not be considered as controlling of Utah's mere notice statute, and the two kinds of schemes should be carefully distinquished.

A notion of absolute rights is problematical because it will lead to absurd results when measured against practical and just laws, commonly accepted and because, if there is an absolute right firmly identified somewhere, then it can by the *only* absolute right. Any right, however important, which conflicts with the one absolute right must necessarily fall. This Court should exercise great caution in identifying the right to choose an abortion as an absolute right or even as a first among equals.

In this case there is a conflict between rights. The right of a pregnant minor to choose, on her own, an abortion is arrayed against the right of the minor's parents to know of the significant activities of their child, especially of a major medical procedure. If this right of the parents cannot prevail here, then parents cannot assert any rights vis-ā-vis their children in the abortion context because there is no right imaginable less intrusive than the right to mere awareness.

What the parents may do beyond mere awareness is strictly within their own province and they act without the aid or blessing of the state. There is nothing in the record

of this case to indicate the actual behavior of parents beyond the point of awareness. There is only the speculation of the Appellant. Since no state action is involved in these anticipated parental reactions, there is no basis for Appellant's constitutional arguments against the statute. See *Moose Lodge #107 v. Irvis*, 407 U.S. 163 (1972).

If parents who are notified of proposed abortions undertake to prevent the free exercise of their daughter's choice or abuse or otherwise mistreat her, they probably violate rights or statutory provisions and would be subject to proper remedies in an appropriate case. But that is not the case before the Court. The Court is being asked to speculate as to what parents will do and thus to decide a matter which is not before it.

D. The statute merely encourages parental involvement; it does not, indeed cannot, compel it.

This Court has previously stated, when confronted with another aspect of the abortion dilemma, (public funding) that a different standard applies when the state merely encourages a particular result, as compared to when the state seeks to compel a result.

> There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy. Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader. *Maher v. Roe*, 432 U.S. 464, at 475-76 (1977).

In the present case it cannot reasonably be said that the State seeks to compel any particular result with respect to

a decision to choose an abortion. On the contrary, the State of Utah chooses explicilty to remain aloof from that difficult decision-making process, and certainly does not presume to involve itself through an alternative decision-maker as Massachusetts did in *Bellotti II.* (For a scholarly critique of the difficulties inherent in any system using an alternative decision maker, as well as a discussion of the vital role of parents, see Watts, *Parent, Child, and the Decision to Abort: A Critique of the Supreme Court's Statutory Proposal in Bellotti v. Baird,* 52 So. Cal. Law Rev., 1869 (1979).) Utah, on the other hand, seeks to merely encourage whatever minimal consultation or involvement parents in given cases may deem appropriate given the reality that they cannot ultimately control the decision.

Under the Utah statutory scheme there can be no "direct state interference with a protected activity," and if there occurs any actual undue interference by anyone, including the parents, with the protected activity, it would probably be actionable, either civilly or criminally under Utah law. This Court should not, under these circumstances, eliminate the minimal residual right of the parents merely to know of an abortion contemplated by their child. The case of a parent who subsequent to such knowledge acts in a way that is inappropriate is a case that is not before this Court.

E. The wisdom and social utility of such a statute should be addressed by the legislature rather than by this Court.

The question of whether a state could or should not require a minimal parental awareness of a minor's abortion decision is a question which presents issues "of policy and value over which opinions are sharply divided" in a way very similar to the question of funding of non-therapeutic abortions which the Court addressed in *Maher v. Roe, supra.* There the Court said, at 479-80:

> The decision whether to expend state funds for non-therapeutic abortion is fraught with judgments of policy and value over which opinions are sharply divided. Our conclusion that the Connecticut regulation is constitutional is not based on a weighing of its wisdom or social desirability, for this Court does not strike down state laws 'because they may be unwise, improvident, or out of harmony with a particular school of thought.' *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955), quoted in *Dandridge v. Williams, supra*, at 484. Indeed, when an issue involves policy choices as sensitive as those implicated by public funding of non-therapeutic abortions, the appropriate forum for their resolution in a democracy is the legislature. We should not forget that 'legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts' *Missouri, Kansas and Texas Ry. Co. v. May*, 194 U.S. 207, 270 (1904) (Holmes, J.).'

Appellant has argued essentially that the Utah law requiring notice to parents is an unwise statute because some parents will not act in their children's best interest when confronted with knowledge of a pregnancy or of a proposed abortion. Since the minimal requirements of the Utah statute regarding abortion notice do not violate any constitutional requirement previously identified by this Court and since they do not place any actual roadblock in the way of a minor seeking an abortion or unduly burden her right to choose an abortion, the Court should leave the difficult social and policy decisions about the wisdom of such a statute to the legislature in precisely the same spirit as suggested in *Maher, supra.*

Most of the arguments addressed by *amici* in this case,as

well as the lower court decisions involving notice-only statutes relied on by Appellant (*Margaret S. v. Edwards*, F. Supp. , (E.D. La. 1980, Civil Action No. 78-2765); *Akron Center for Reproductive Health, Inc. v. City of Akron*, 479 F. Supp. 1172 (N.D. Ohio 1979); *Women's Community Health Center, Inc. v. Cohen*, 477 F. Supp. 542 (D. Maine 1979); and *Wynn v. Carey*, 582 F. 2d 1375 (7th Cir. 1978)), will upon careful analysis be seen to constitute opinions about the wisdom or social desirability of a statute like Utah's. As pointed out above, it is beyond the province of this Court to review such a statute on the basis of its wisdom. Such a determination should be reserved to the state legislature which has the capacity to weigh the policy considerations at least as well as this Court can do so.

It should be noted also that these cases involved statutes that generally established schemes far more complicated or burdensome than Utah's, including consent provisions, time limitations, and other clear disincentives to abortion. The simplicity of the Utah requirement suggests persuasively that it is directed at least as much toward preserving family integrity in a theoretical sense and allowing parents to deal with the aftermath of an abortion decision as it is toward allowing parental involvement in any actual decision making.

F. There is no constitutional requirement that parents must invariably act in the best interests of their child.

The holding which Appellant seeks from this Court is in reality a holding that parents are required by the Constitution always to act in the best interests of their children, or at least that no statutory scheme under which parents might theoretically act other than in the best interests of their children may stand under the Constititution. That some parents fail in this regard cannot be doubted. That

all parents must therefore forego a requirement to be notified of their daughter's abortion decision is not logical and not required by the Constitution. As the Court has only recently observed in *Parham v. J.R.*, 442 U.S. 584 (1979):

> The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children. 1 W. Blackstone, Commentaries *447; 2 J. Kent, Commentaries on American Law *190.
>
> As with so many other legal presumptions, experience and reality may rebut what the law accepts as a starting point; the incidence of child neglect and abuse cases attests to this. That some parents "may at times be acting against the interests of their child" as was stated in *Bartley v. Kremens*, 402 F. Supp. 1039, 1947-1948, (E.D. Pa. 1975), vacated and remanded, 431 U.S. 119 (1977), creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests. See Rolfe & MacClintock, 348-349. The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition. *Parham, supra at 602-603.*

A notion that no statutory scheme could stand if it allowed parents the possibility of acting contrary to the best interests of their children would be as unworkable as it would be contrary to history. The many legal disabilities

of minors operate inherently in such a way that parents must act in behalf of their children or make significant decisions for them in many instances. To expect that all such decisions will be made altruistically or with the child's interest uppermost in mind is certainly unrealistic. But the remedy sought by Appellant here would require this Court to assume, equally unrealistically, that doctors, or courts, or state agencies invariably are more prone to act in the child's best interests than parents are. Until parents have proven themselves irresponsible with respect to a particular instance of an abortion decision, the statutory presumption of their competency to be minimally involved in the process should stand.

G. The Constitution requires only that the government not interfere with an abortion decision, not that the woman be spared all negative consequences of making such a decision.

After all that has been said in this case, it perhaps is gilding the lily to state that the pregnancy of a minor is a matter fraught with problems and emotional consequences for many of the persons concerned with the well-being of the minor. Some of these problems do not admit of simplistic or doctrinaire solutions. While there is no reason to try to make these problems any more severe than necessary, it is likewise unrealistic and unjustified for Appellant to ask the courts to relieve her of all of the difficult or uncomfortable consequences of her situation. The Constitution has been deemed to require that the minor be afforded the privacy right to choose an abortion without a veto power of a third party. The Constitution has not been deemed to require, nor can it logically be so interpreted, that persons who exercise protected rights will not suffer some negative consequences for their choices, including such things as the disapproval or rejection of those around

them. Even an explicit constitutional right such as freedom of speech can only be extended so far as to say that the government may not deprive one of the opportunity of publicly espousing an unpopular view; the right cannot be extended to require that one's expressed views be met with approval, support and acceptance. Such a requirement would lead inexorably to the deprivation of a host of other rights.

Similarly, in the present circumstances, a minor may clearly demand that the state not interfere in any direct way, (or delegate such interference to a third party) with her decision to undergo an abortion. But by the same token it is illogical for the minor to insist that the state insure that she be spared all discomfiting consequences of her abortion decision. The state does not here require that the minor be made a public spectacle or held up to the ridicule of the neighborhood, which would indeed constitute a violation of a privacy right. The state does not even go so far as to require the minor to approach a tribunal or an administrative officer or agency for sanction of her choice. Rather the state merely requires that the treating physician grant the minor's parents the minimum awareness which constitutes the only remaining interest which parents can conceivably assert in the matter of their daughter's pregnancy. Absent such a minimal requirement the family relationship has effectively been declared a nullity with respect to such vital matters as medical treatment and value judgments regarding procreation.

Neither the minor's desire for privacy, which is only minimally infringed by notice that goes only to parents, nor her desire to avoid every negative consequence of her condition, rises to a level of interest requiring this Court to invalidate a state statute which does no more than recognize an historic and traditional integrity of the family unit.

H. The privacy right sought by Appellant collides unavoidably with a reserved, not delegated, right of families.

Essentially the privacy right identified in the abortion context is too sweeping a right to be asserted literally in the context of an unemancipated minor living at home, dependent on her parents. While it has been established that the right extends far enough to insure the exercise of the ultimate choice by the minor, if she is willing to accept the consequences of that choice, it goes too far to suggest that the unemancipated minor may make that choice in total secrecy from those who are charged with her well-being and support. If the privacy right is interpreted to mean that children may make major decisions about their own well-being by perpetrating a deception upon their parents, then the family relationship becomes meaningless as an instrumentality for the nurturing of children. Children have no reason to respect or give heed to any of the views of their parents, and parents have no means to convey their values or views on important subjects to their children. Parents are left with the mere financial burden of supporting their minor children without any concomitant authority to provide real guidance to those children as soon as the child's views on an important subject begin to diverge from those of the parent.

While as a general proposition it may not be unreasonable to say that privacy precludes requiring a woman seeking an abortion to divulge that fact to strangers, the state, or its agencies or tribunals, it does not follow that the same right precludes knowledge by the parents when the abortion is being sought by their minor daughter. Historically, sociologically and legally, the parents stand in a relationship to their child far different from the relationship that might be claimed between other parties (including the State) and an adult woman seeking

an abortion. It is difficult to comtemplate a relationship where the right of privacy as formulated in the abortion context could be less relevant than in the confines of the nuclear family.

In this regard it is important to keep in mind that the State of Utah, by its statutory requirement, does not require any notice be given to it or its agents, nor does it delegate any power to parents. The state, by its statute, has conceded that it has no power to place a roadblock in the way of a minor seeking an abortion or to veto her decision.

Furthermore, the state cannot delegate a power which it does not have. The statute, rather than being a delegation of some authority which the state has or claims to have, is merely a recognition and a protection of a power inherent in the family unit which does not derive from any governmental grant. Indeed, it may well be that this right of parents to be aware of major occurrences in the lives of their minor children is one of the rights reserved to the people under the Ninth Amendment to the Constitution. See the general discussion of this concept in *Griswold v. Connecticut*, 381 U.S. 479 (1965) at 486-499, Justice Goldberg concurring. If this be so, then it is inappropriate to regard the Utah statute as an attempt to delegate a state power to parents. On the contrary it becomes clear that the state is merely protecting the exercise of the familial right to the extent possible, without denying the exercise of the abortion right. It is difficult to see how a more fair balancing of these rights could be struck. Under almost any other formula, one right or the other would be effectively abolished.

II

THE STATUTE SERVES SIGNIFICANT STATE INTERESTS INCLUDING ENCOURAGEMENT OF THE INTEGRITY OF THE FAMILY UNIT AS THE BASIC SOCIAL ENTITY.

It seems unnecessary to review for this Court in great detail the fundamental nature of the family unit in the social and legal structure of this nation. Excellent discussions of this subject are found in at least two recent decisions of the Court, *Bellotti II, supra,* Part II, Slip opinion, 10-16, (1979) and *Parham v. J.R.*, ____U.S.____(1979). Additionally, the Court is respectfully referred to the extensive analysis of family integrity and the importance of protecting adolescents through family involvement in the *amicus curiae* brief in support of Appellees submitted on behalf of the Utah Association of Women by Professor Lynn Wardle. Suffice it to say that the Court, in harmony with our entire jurisprudence, has historically given the greatest deference to the rights of parents vis-ā-vis their children, without having to articulate those rights as emanating necessarily from any particular constitutional source. The Court has the opportunity in this case to continue to give substance to those familial prerogatives while not departing from the line of cases which preclude an undue burdening of the privacy right to choose an abortion. This is possible because the Utah requirement of mere notice to parents does not in fact impinge on the minor's protected right of decision-making, or if it does so at all, is so minimally burdensome that it is justified by a significant state interest in promoting the integrity of the family.

A. The purpose of protecting family integrity is rationally served in this case by regulating one aspect of the practice of medicine.

The fact that the Utah statute regarding notice to parents is included in a section of code regarding the regulation of medical practice for abortions does not diminish the fact that the ultimate rationale for the statute is predicated upon protection of family integrity; rather the location strengthens the notion.

The one person who must be aware of and involved in any woman's legal abortion is her physician. Physicians are subject to licensure and regulation by the state in numerous ways and generally may be regarded as aware of and sensitive to statutory conditions upon the practice of their profession. Thus, the physician becomes the logical point of control for the state to insure that family integrity is not subverted by a minor who seeks to deceive her own parents regarding an abortion. The physician is the person in the abortion process with both the kind of involvement and the kind of professional and legal responsibility to be an appropriate source of notification to the parent.

It is appropriate also that the physician be the person to actually give notice to the parent rather than requiring the minor to do so personally. The physician will be in a position to evaluate and judge any untoward parental reaction and if necessary direct the minor to other sources of professional or legal help in the event that some of the more drastic consequences envisioned by Appellant actually occur in some instances. The Utah law does not leave the minor without an advocate on behalf of her best interest in the case where her parents might default in this regard, but still the Utah law respects the privacy right to the greatest degree possible by involving the fewest persons while still accommodating the irreducible familial right of awareness.

To require a physician to make this minimal notification to parents cannot be said to infringe unjustifiably upon the physician's own exercise of his best medical judgment any more so than if the state were to require the doctor to take

the patient's temperature, medical history and blood pressure before performing the abortion. The fact that a doctor may consider one of these procedures unnecessary in a particular instance would not be persuasive in light of a reasonable state regulation requiring them in all cases. Similarly, the fact that a doctor does not feel notification is necessary in a particular situation is not sufficient to overturn a reasonable requirement that notification be given in all cases. The necessity of notification is not a matter for the doctor's professional discretion or sociological interpretation, but rather a legal requirement to protect minimal rights of others, which the state may legitimately impose.

The results of notification, on the other hand, may in fact inure to the benefit of the doctor in exercising his best medical judgment. The reaction of parents, as mentioned above, might be one such factor. Another such factor may well be additional information which the physician gains about the medical history of the minor. It is a reasonable supposition that minors in many cases are not aware of their own medical histories in great enough detail to give a physician sufficient data as to past diseases, drug reactions, allergies and family history to enable him to adequately assess the risks of surgery. The parent may be the only practical source of that necessary information. For the state to define the physician's best medical judgment in such a way as to provide the avenue to obtain such information is eminently reasonable.

Additional reasonable considerations supporting a notice requirement involve the issues of payment and medical complications. If a minor's parents cannot be notified of a proposed abortion, could they later be required to pay for it under their general duty to support their minor daughter? What if the minor can't or won't pay? To whom would the practitioner have recourse? Is

there perhaps an implied right of the minor to become a recipient of some form of public assistance, if payment were available from that source, without her parents' knowledge? Most governmental programs for assistance would require parental consent for eligibility and indeed would look to the parents, if they were financially able, to pay their child's expenses.

Similarly, what happens if there are medical complications of an abortion, such as hemorrhaging, after the fact? If she requires further treatment or is hospitalized, may the parents be then informed, including the reasons for the treatment? What if, in the rare but statistically identifiable case, the minor dies? Do the parents have any recourse against the physician who proceeded in total disregard of the parent's right to know?

B. The encouragement of parental counsultation, even though it cannot be compelled or guaranteed efficacious, is a legitimate state interest.

A more specific articulation of the interest which the state furthers by a notice requirement is that it may encourage parental consultation in the abortion decision. Members of the court have previously recognized this interest, noting that:

> There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender year, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the attending

> physician at an abortion clinic, where abortions for pregnant minors frequently take place. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, at 91, Justice Stewart concurring (1976).

This is not say that consultation will or must occur in every instance, nor is the statute defeated on constitutional grounds merely because such consultation does not occur in given cases or would be unproductive or unhelpful in other cases. The state merely *encourges* such consultation to take place; it does not, indeed cannot, compel such consultation. The entire matter of how to deal with the information provided to parents is left, as it should be, to be dealt with in the context of the family unit without any kind of intrusion from a governmental agency. The state has exercised the only real power which it legitimately now can exercise in this area by seeking to assure that parents are not left in ignorance of an abortion decision through deception on the part of their daughter.

If any inappropriate actions are taken by parents as a result of being notified of an abortion decision, the state may then have cause to intervene under its child abuse and neglect statutes. Such intervention is the appropriate limit for active state involvement in such matters, except to assure that parents are not deceived by their daughters with the assistance of a physician or an abortion clinic.

The Utah requirement of notice to parents before an abortion is performed on a minor is not conceptually different from the requirement that parents or guardians receive a summons in every case where a petition alleging delinquency, neglect or dependency is filed in the juvenile court of Utah, as required by Section 78-3a-26, Utah Code Annotated. In that situation, like the abortion situation, the minor has certain protected rights which he or she may exercise, but it is conceivable that parents may seek to in-

fluence the child's choices in exercising those rights. Like the abortion situation, the notice of pendency of an action in juvenile court may cause some parents to become angry or even abusive to their children (and the summons imparts more than mere knowledge or "encouragement" — it *requires* the parents to appear and otherwise become actively involved) but this possibility surely does not invalidate the statutory requirement of notice to all parents. A state statute that seeks to encourage a particular kind of activity is not defeated merely because it is less than universally effective, or because some undesired reactions occur.

C. The state furthers a legitimate interest in enforcing its criminal laws regarding sexual behavior through this statute.

The State has an additional interest in requiring parental notification of the abortion of a minor — an interest great enough almost to stand independent of the primary interest in maintaining family integrity in matters relating to private but important decisions of family members. This interest involves the detection and punishment of criminal behavior. Unless the pregnancy of an unmarried minor has resulted from some action or process other than that ordinarily thought of, it was in all probability the result of criminal behavior. Specifically under Utah law, if the girl is under 14, a felony of the First degree has been committed, to-wit; rape, under Utah Code Annotated, Section 76-5-402.

If the girl is between 14 and 16 years of age, the crime of unlawful sexual intercourse has been committed which is a felony of the Third degree under Section 76-5-401, Utah Code Annotated (or a class B misdemeanor if the perpetrator was no more than 3 years older than the victim.)

If the girl is between 16 and 18, the crime of rape may still have been committed (in this situation a felony of the second degree) if the victim did not consent to the act in the manner specified in Section 76-5-406, Utah Code Annotated.

In any case where a minor is involved, if her consent was not obtained, no matter what her age, a felony has been committed, and no valid consent is possible at all under the age of 14.

Since the girl is not married to the father (by definition, married girls under 18 are not minors under Utah law, Utah Code Annotated, Section 15-2-1) the additional crime of fornication (Section 76-7-104, Utah Code Annotated) or adultery, if the father was married to another, (Section 76-7-103, Utah Code Annotated) is involved. Moreover, in some cases the crime of incest, a felony of the third degree (Section 76-7-102, Utah Code Annotated) may also be involved.

In every case of a pregnancy of a minor in Utah (unless induced by an extraordinary or supernatural means) one or more of the crimes listed above is involved.

In every case of unmarried pregnancy under the age of 16 a crime has been committed. In the case of the Appellant either rape or unlawful sexual intercourse, depending on whether there was a valid consent, was committed.

In the reality of things there will seldom be an opportunity to identify the perpetrator or pursue appropriate criminal remedies unless parents become aware of their daughters' activities, albeit an undesired pregnancy may be in all too many cases the factor which occasions the parents' awareness. To say that parents have no entitlement to such awareness whatsoever, means that there is no effective mechanism for the enforcement of the State's criminal laws

in this important area and leads to the development of a profound and pervasive disregard for the duly enacted criminal laws of the state. The power sought by minor appellant to end her pregnancy in complete secrecy from her parents would lead, if granted, to a significant weakening, both symbolically and practically, of the state's ability to enforce its criminal laws.

D. The situation of an emancipated minor presents a different case which is not presently before the Court, and should be disregarded.

To the extent that Appellant now seeks to rely upon the fact situation in *L.R. v. Hansen,* (Civil No. C-80-0078J, United States District Court, Utah), (Appellant's Brief, 12-14, 19) the reliance is misplaced and has the effect of inviting the Court to rule upon a case that is not before it. In that case, Judge Jenkins determined from the testimony of the plaintiff herself that she was in fact emancipated and should be considered to have rights identical to an adult woman with respect to an abortion decision. For this reason he concluded, for purposes of a preliminary injunction limited to the named plaintiff only, that the provisions of the challenged statute were either unconstitutional as applied to the plaintiff or that they fail to apply to her as an emancipated minor.

That case presents an issue completely different from the present case and is in no way a part of the record here. The Court should disregard the situation of the emancipated minor and the case of *L.R. v. Hansen* in deciding the case before it which involves only the unemancipated minor, living at home, in the usual parent-child relationship.

CONCLUSION

For the reasons set forth above, as well as for the reasons set forth in the briefs *amicus curiae* submitted in support of Appellees by the Utah Association of Women and by Americans United for Life, the previsions of Section 76-7-304 (2), Utah Code Annotated, 1953, do not violate the Constitution of the United States. The Court should take this opportunity to clarify the sensitive subject of abortion regulation by upholding a statute which does nothing more than preserve a minimal parental right to awareness and to protection against deception in the abortion decisions of their minor daughters. The Court should affirm the unanimous ruling of Supreme Court of the State of Utah.

Respectfully submitted,

ROBERT B. HANSEN
Attorney General

PAUL M. TINKER
Assistant Attorney General

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-5903

H__ L__,

Appellant,

—v.—

HONORABLE SCOTT M. MATHESON, *et al.*,

Appellees.

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BRIEF OF AMICI CURIAE PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., THE AMERICAN PUBLIC HEALTH ASSOCIATION, THE ASSOCIATION OF PLANNED PARENTHOOD PHYSICIANS, INC., THE AMERICAN ACADEMY OF CHILD PSYCHIATRY, THE AMERICAN ASSOCIATION OF SEX EDUCATORS, COUNSELORS AND THERAPISTS, THE NATIONAL ASSOCIATION OF SOCIAL WORKERS, INC., THE NATIONAL ABORTION FEDERATION, THE ASSOCIATION FOR WOMEN IN PSYCHOLOGY AND CERTAIN MEDICAL SCHOOL DEANS, PROFESSORS AND INDIVIDUAL PHYSICIANS IN SUPPORT OF THE APPELLANT

(Names of Individual *Amici* appear within)

EVE W. PAUL
c/o Planned Parenthood Federation
of America, Inc.
810 Seventh Avenue
New York, New York 10019
(212) 541-7800

HARRIET F. PILPEL
437 Madison Avenue
New York, New York 10022
(212) 758-4010

Attorneys for Amici Curiae

Of Counsel:

GREENBAUM, WOLFF & ERNST
437 Madison Avenue
New York, New York 10022

Individual *Amici*

ROBERT W. BERLINER, M.D.
Dean
Yale University School of Medicine*
333 Cedar Street
New Haven, Connecticut 06510

JACK N. BLECHNER, M.D.
Professor and Head
Department of Obstetrics and Gynecology
University of Connecticut Health Center
263 Farmington Avenue
Farmington, Connecticut 06032

DANIEL K. BLOOMFIELD, M.D.
Dean
School of Basic Medical Sciences
Urbana-Champaign
University of Illinois, College of Medicine
Urbana, Illinois 61801

F.J. BONTE, M.D.
Dean
The University of Texas
Southwestern Medical School
Dallas, Texas 75235

NICHOLAS J. COTSONAS, JR., M.D.
1737 West Polk Street
Chicago, Illinois 60612

---

* Titles and affiliations for identification purposes only.

ROBERT D. COYE, M.D.
Dean
Wayne State University School of Medicine
540 East Canfield Avenue
Detroit, Michigan 48201

PRESTON V. DILTS, JR., M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
University of Tennessee
853 Jefferson Avenue
Memphis, Tennessee 38163

GORDON W. DOUGLAS, M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
New York University School of Medicine
550 First Avenue
New York, New York 10016

LEO J. DUNN, M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
Virginia Commonwealth University
1200 East Broad Street
Richmond, Virginia 23298

ROBERT H. EBERT, M.D.
Chairman of Board, Population Council
Former Dean, Harvard Medical School
1 East 75th Street
New York, New York 10021

KENNETH C. EDELIN, M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
Boston University School of Medicine
80 East Concord Street
Boston, Massachusetts 02118

T.N. EVANS, M.D.
Past President of the American College of Obstetricians & Gynecologists and of the American Gynecological Society
Professor and Chairman of Gynecology and Obstetrics
Wayne State University School of Medicine
Detroit, Michigan 48201

CHARLES E. FLOWERS, JR., M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
University of Alabama in Birmingham
Birmingham, Alabama 35294

HENRY W. FOSTER, JR., M.D.
Professor of Obstetrics and Gynecology
Meharry Medical College
1005 18 Avenue North
Nashville, Tennessee 37208

FRITZ FUCHS, M.D.
Harold & Percy Uris Professor of Reproductive Biology and Obstetrics and Gynecology
Cornell University Medical College
New York, New York 10021

JOHN W. GREENE, JR., M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
University of Kentucky Medical Center
Lexington, Kentucky 40536

ARTHUR L. HASKINS, M.D.
Professor and Head
Department of Obstetrics and Gynecology
University of Maryland Hospital
Baltimore, Maryland 21201

T. TERRY HAYASHI, M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
University of Pittsburgh Medical School
Magee Womens Hospital
Forbes & Halket
Pittsburgh, Pennsylvania 15213

CHARLES H. HENDRICKS M.D.
Professor and Chairman
Obstetrics and Gynecology
University of North Carolina
Chapel Hill, North Carolina 27514

LAWRENCE L. HESTER, JR., M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
Medical University of South Carolina
171 Ashley Avenue
Charleston, South Carolina 29403

ANDREW D. HUNT, M.D.
Coordinator
Medical Humanities Program
Michigan State University
East Lansing, Michigan 48824

IRWIN H. KAISER, M.D.
Professor-Director
Department of Obstetrics and Gynecology
The Hospital of Albert Einstein College
of Medicine
1825 Eastchester Road
Bronx, New York 10461

RAYMOND H. KAUFMAN, M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
Baylor College of Medicine
Houston, Texas 77030

WILLIAM C. KEETTEL, M.D.
Professor and Head
Department of Obstetrics and Gynecology
University of Iowa Hospital
Iowa City, Iowa 52240

THOMAS H. KIRSCHBAUM, M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
Michigan State University
East Lansing, Michigan 48824

SCHUYLER G. KOHL, M.D.
Professor of Obstetrics and Gynecology
Downstate Medical Center
450 Clarkson Avenue
Brooklyn, New York 11203

JAMES H. LEE, JR., M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
Jefferson Medical College
Thomas Jefferson University
1025 Walnut Street
Philadelphia, Pennsylvania 19107

HARRY M. LITTLE, JR., M.D.
Associate Professor
Department of Obstetrics and Gynecology
University of Texas Medical Branch
Galveston, Texas 77550

ERNEST W. LOWE, M.D.
Professor
Department of Obstetrics and Gynecology
Boston University
School of Medicine
720 Harrison Avenue
Boston, Massachusetts 02118

SHERMAN M. MELLINKOFF, M.D.
Dean
UCLA School of Medicine
Los Angeles, California 90024

FREDERICK NAFTOLIN, M.D., D. PHIL.
Professor and Chairman
Department of Obstetrics and Gynecology
Yale University School of Medicine
333 Cedar Street
New Haven, Connecticut 06510

KENNETH R. NISWANDER, M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
University of California at Davis
Sacramento, California 95817

ROY T. PARKER, M.D.
F. Bayard Carter Professor and Chairman
Department of Obstetrics and Gynecology
Duke University Medical Center
Durham, North Carolina 27710

BEN M. PECKHAM, M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
University of Wisconsin Medical School
500 Highland Avenue
Madison, Wisconsin 53706

L. CHARLES POWELL, JR., M.D.
Professor
Department of Obstetrics and Gynecology
University of Texas Medical Branch
Galveston, Texas 77550

SEYMOUR L. ROMNEY, M.D.
Professor
Albert Einstein College of Medicine
1300 Morris Park Avenue
Bronx, New York 10461

KENNETH J. RYAN, M.D.
Chairman
Department of Obstetrics and Gynecology
Harvard Medical School
Boston, Massachusetts 02115

RICHARD H. SCHWARZ, M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
State University of New York
Downstate Medical Center
450 Clarkson Avenue
Brooklyn, New York 11203

JOHN J. SCIARRA, M.D., PH.D.
Chairman
Department of Obstetrics and Gynecology
Northwestern University Medical School
333 East Superior Street
Chicago, Illinois 60611

DONALD P. SWARTZ, M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
Albany Medical College
Albany, New York 12208

W. NORMAN THORNTON, JR., M.D.
Professor and Chairman Emeritus
Department of Obstetrics and Gynecology
University of Virginia School of Medicine
Charlottesville, Virginia 22901

J. ROBERT WILLSON, M.D.
Professor
Department of Gynecology and Obstetrics
University of Michigan
Medical School
Ann Arbor, Michigan 48104

RALPH M. WYNN, M.D.
Department of Obstetrics and Gynecology
University of Arkansas for Medical Sciences
4301 West Markham
Little Rock, Arkansas 72205

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Planned Parenthood Federation of America, Inc., the American Public Health Association, the Association of Planned Parenthood Physicians, Inc., the American Academy of Child Psychiatry, the American Association of Sex Educators, Counselors and Therapists, the National Association of Social Workers, Inc., the Na-

tional Abortion Federation, the Association for Women in Psychology and the individual medical school deans, professors and physicians listed above respectfully submit this brief as *amici curiae* in support of the appellants. All parties have given their consent for filing of this brief in letters filed with the Clerk of this Court.

Interest of the *Amici*

Planned Parenthood Federation of America, Inc.

Planned Parenthood Federation of America, Inc., also known as Planned Parenthood-World Population (Planned Parenthood), is a not-for-profit corporation organized in 1922 and existing under the laws of the State of New York. Its headquarters are in New York City. It is the leading national voluntary public health organization in the field of family planning.

Planned Parenthood has 187 affiliates in 43 states and the District of Columbia, all of them separate not-for-profit entities. These affiliates operate approximately 744 family planning clinics offering services to the public. Most affiliates offer medical services including 36 which offer abortion services as part of their program. Eight affiliates are educational units without medical services. Most Planned Parenthood affiliates which do not perform abortions themselves offer pregnancy counseling and referral services.

Planned Parenthood provides its affiliates with guidance in the areas of contraception, voluntary sterilization, infertility, abortion, sex education and education for marriage and parenthood. Each of the affiliates offering medical services functions under strict medical standards promulgated by the National Medical Committee in conjunction with local medical committees.

These committees are made up of health professionals, the large majority of whom are physicians.

Planned Parenthood also functions as a clearing house for information and services relating to these same areas. It formulates medical and clinical standards which are available to its affiliates and generally on a nationwide basis and develops guidelines and materials relating to public and professional education in all aspects of family planning. Its Medical Director and other consultants confer with other national medical organizations, medical school faculties and local agencies in relation to teaching techniques, formation of clinics and the like.

Many of Planned Parenthood's affiliates operate in cooperation with local public health facilities. The affiliates are also teaching and training centers for physicians, nurses, teachers and social workers from this country and foreign countries and provide referral services for their clients to qualified medical specialists and facilities.

As a necessary corollary of its activities in the area of contraception, Planned Parenthood is committed to the principle that safe abortions should be available to all who need them. Planned Parenthood does not view abortion as an alternative to contraception; it believes, however, that abortion services are essential to protect women where contraception is unavailable, where it has not been used for some other reason and where it has failed.

Planned Parenthood's Medical Standards and Guidelines contain requirements for adequate pregnancy and abortion counseling which include standards for the qualifications and training of counseling personnel.

These Standards and Guidelines provide: "If patient consents, efforts should be made to involve significant members from the women's environment in the counseling process—i.e., boyfriend, husband, parents or others who may lend support." Planned Parenthood Manual of Medical Standards and Guidelines, Part One, Section VII-C (revised July 31, 1978). However, consent for the abortion must be required only of the woman who chooses the procedure. Manual of Medical Standards and Guidelines, Part One, Section VII-A (December 15, 1977).

American Public Health Association

The American Public Health Association is a national non-governmental organization established in 1872. Its object is to protect and promote personal and environmental health. With a membership of over 50,000, it is the largest public health organization in the world. Within this membership, both professional health workers and consumers act in a leadership role to develop a national policy for the provision of equitable, quality health care for all citizens.

Association of Planned Parenthood Physicians, Inc.

Planned Parenthood works closely with the Association of Planned Parenthood Physicians, Inc. (APPP), a New York not-for-profit corporation organized in 1974. APPP is the successor to the American Association of Planned Parenthood Physicians, an unincorporated association which was organized in 1963. In 1978, APPP had 850 members, all of whom were physicians or other health professionals associated with family planning.

APPP was formed for scientific, educational and charitable purposes and specifically to promote the on-

going interest in family planning in order to improve the stability and health of the family through responsible parenthood.

American Academy of Child Psychiatry

The American Academy of Child Psychiatry is a professional association of 2,300 child psychiatrists. It was founded in 1952 and is concerned with the stimulation and advancement of medical contributions to the knowledge and treatment of psychiatric problems of children and adolescents.

American Association of Sex Educators, Counselors and Therapists

The American Association of Sex Educators, Counselors and Therapists is a national nonprofit membership organization founded in 1967. Its aims are to assist those professionals responsible for sex education, counseling and therapy programs by providing training and standards of competency in these areas.

National Association of Social Workers, Inc.

The National Association of Social Workers is a nonprofit national organization of professional social workers which is devoted to the advancement of sound public policy for social work consumers as well as professionals. A substantial portion of its 80,000 members are employed in child welfare, in school social work and in family service agencies. More than one-third of its membership is engaged in providing health and mental health services in public, voluntary and private institutional and out-patient settings throughout the country.

National Abortion Federation

The National Abortion Federation is a national, non-profit organization composed both of professional individuals and groups providing abortion services and of others committed to making safe, legal abortion available to all women.

Association for Women in Psychology

The Association for Women in Psychology is a not-for-profit scientific and educational organization. It is committed to expanding opportunities for women in the profession of psychology and educating psychologists and the public to the psychological, social, political and economic problems of women. It has over 2,000 members, women and men.

Individual Physicians, Professors and Medical School Deans

The individual physicians who as *amici* subscribe to this brief all practice obstetrics and gynecology as their medical specialty or are responsible for the education of medical students and residents, some of whom are in training in the specialty of obstetrics and gynecology.

Concerns of the *Amici*

Amici all share a longstanding concern with the problem of teenage sexual activity and the attendant risk of teenage pregnancy which involves more than half the adolescent population. *11 Million Teenagers* (Alan Guttmacher Institute 1976); Klein, "Antecedents of Teenage Pregnancy", 21 Clinical Obstet. & Gynecol. 1151-59 (1978). Over 40% of the women in the United States aged 15-19 years in 1976 had experienced pre-

marital intercourse; over a million teenagers became pregnant, and of those, an estimated 780,000 were unmarried. Zelnik and Kantner, "Contraceptive Patterns and Premarital Pregnancy Among Women Aged 15-19 in 1976", 10 Family Planning Perspectives 135 (1978). Over 570,000 live births to women under 20 were registered in 1976. In 1976 and 1977, approximately one-third of all abortions were obtained by teenagers. Forrest, Sullivan and Tietze, "Abortions in the United States, 1977-1978", 11 Family Planning Perspectives 329 (1979); Tietze, "Teenage Pregnancies: Looking Ahead to 1984", 10 Family Planning Perspectives 205 (1978).

Amici believe that the effect of the Utah parental notification statute will be that parents may interfere with their daughter's decision to have an abortion, even when continuing the pregnancy is not in the best interests of the health of the minor woman. Furthermore, *amici* believe that if a minor knows that her parents will be notified, she may delay having an abortion until later in the pregnancy, when the risks of the procedure increase, or she will be forced, by default, to carry the pregnancy to term, which also poses greater medical and emotional risks to the minor than an early abortion. The possibility is great, moreover, that some minors will turn to illegal abortions or self-abortion.

Amici agree that parental involvement is appropriate and desirable. There are, however, many teenagers who will not consult with their parents, and there are many parents who are unable to cope with the situation and might either suffer physical or emotional harm themselves or inflict such harm upon their pregnant daughter. The Utah statute in many cases will

not further supportive parental involvement. Rather, it interferes with the minor woman's right to decide, with the advice of her physician, that an abortion is in her best interest, and thus unduly burdens her exercise of that right.

The Planned Parenthood Federation of America, Inc., the American Public Health Association, the Association of Planned Parenthood Physicians, Inc., the American Academy of Child Psychiatry, the American Association of Sex Educators, Counselors and Therapists, the National Association of Social Workers, Inc., the National Abortion Federation, the Association for Women in Psychology and the individual medical school deans, professors and physicians named above, by reason of their long experience and knowledge of the health needs of adolescents believe that they are in a unique position to aid the Court in its resolution of the issues raised in this case. *Amici* have assembled relevant and recent scientific findings which are discussed herein.

Statutory Provisions Involved

The issue in this case is the constitutionality of Utah Code Annotated § 76-7-304(2) (1953) which requires parental notification when a minor woman wishes to obtain an abortion, as follows:

> To enable the physician to exercise his best medical judgment, he shall: . . . (2) notify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed if she is a minor or the husband of the woman, if she is married.

Pursuant to § 76-7-314(3) of the Utah Code, this section is incorporated in the criminal code. A violation is

punishable by a fine not to exceed $1,000, § 76-3-301(3), and imprisonment not to exceed one year. § 76-3-204(1).

The Utah Supreme Court upheld the parental notification statute. *H__ L__ v. Matheson*, No. 16249 (S. Ct. Utah Dec. 6, 1979). In so doing, the court interpreted the statute as requiring only "limited parental involvement". Slip op., at 9. The court also held that the phrase "if possible" meant that parental notification was required in all cases where, "in the exercise of reasonable diligence," the physician could ascertain the parents' identity and location. Slip op., at 10.

SUMMARY OF ARGUMENT

In *Bellotti v. Baird*, ____ U.S. ____, 99 S. Ct. 3035 (1979), this Court invalidated a Massachusetts statute which required a minor seeking an abortion to obtain parental consent or, in the alternative, the approval of a court; the statute mandated "parental notification and consultation in all instances." *Id.* at 3052. The Utah statute at issue in this case requires parental notification for minors seeking abortion unless it is physically impossible.

The effect of the Utah statute is not ameliorated by the fact that it requires only parental notification and not consent. The effect of such a provision will be that minors who are fearful that their parents will be notified will turn to illegal abortionists or self-abortion with the severe health risks that both alternatives imply. Or, some minors will delay the decision to have an abortion until they must have a late-trimester abortion or carry the pregnancy to term. Both of these possibilities also entail increased health risks.

In addition, the Utah statute substantially interferes with the confidential relationship between the physician and his minor patient. This relationship is crucial to the provision of optimal health care in the best interest of the minor woman.

As the Utah statute does not operate to protect the minor woman's health, and since the state cannot hope to enforce supportive parental consultation through regulation, the Utah statute does not serve the minor's best interest. The statute is an unconstitutional interference with the minor woman's fundamental right to decide, in consultation with her physician, to terminate an unwanted pregnancy.

ARGUMENT

I. THE UTAH STATUTE'S REQUIREMENT OF PARENTAL NOTIFICATION FOR ALL MINORS IS AN UNCONSTITUTIONAL INTERFERENCE WITH A MINOR WOMAN'S FUNDAMENTAL RIGHT TO ABORTION IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION.

This Court approved provision of safe, legal abortions in *Roe v. Wade*, 410 U.S. 113 (1973). The woman's fundamental right to decide, in consultation with her physician, to have an abortion, was held to protect minor women in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976) where this Court observed,

> Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults,

> are protected by the Constitution and possess constitutional rights. 428 U.S. at 74.

The Utah parental notification statute presents an overwhelming burden to many minors who need a legal abortion. While *amici* consider supportive parental involvement to be the ideal situation, they also recognize that in many instances parents will not help their daughter to make a rational decision in her best interests. Indeed, parents may be punitive or even abusive when they learn that their daughter has decided to have an abortion.

This Court's previous decisions are clear that an absolute requirement of parental involvement in the abortion decision, whether by notification or consent, is unconstitutional. Indeed, a notification requirement which allows no exceptions has the same harmful consequences as a requirement of parental consent. This Court has been continuously watchful of the minor woman's fundamental right to decide to prevent or terminate a pregnancy. *Carey v. Population Services International*, 431 U.S. 678 (1977); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976); *cf. Eisenstadt v. Baird*, 405 U.S. 438 (1972).

One of the reasons for invalidating the statutory scheme in *Bellotti v. Baird*, ____ U.S. ____. 99 S. Ct. 3035 (1979) was that the Massachusetts statute required "parental *notification* and consultation in all instances." *Id.* at 3052. (Emphasis added). The Massachusetts statute was held to be an unconstitutional interference with a "right of unique character." *Id.* In concurrence, four justices noted that the right to privacy encompassed both the right to independent decision making and the right to "avoid disclosure of

personal matters." 99 S. Ct. at 3054, citing *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977).

Two recent Federal District Court decisions dealt with the issue of parental notification for minors seeking abortion. The Louisiana District Court in *Margaret S. v. Edwards*, No. 78-2765 (D. La. Feb. 29, 1980) applied the holding in *Bellotti* to a Louisiana parental notification statute. Noting that this Court had focused on the unconstitutionality of requiring "consultation or notification in every instance," citing *Bellotti v. Baird*, 99 S. Ct. at 3052, the Louisiana court held that parental notification would have a "chilling effect on the minor's right to independently make . . . decisions which are the basis of a woman's constitutional right to obtain an abortion." Slip op. at 25. The Court rejected a proffered state interest that notification would encourage consultation between the minor and her parents since "merely giving notice to the parents does not assure that there will be any meaningful dialogue." *Id.*

In *Women's Community Health Center v. Cohen*, 477 F. Supp. 542 (D. Me. 1979), the Maine District Court cited *Bellotti* as supporting the proposition that a blanket parental notification requirement, as well as a parental consent requirement, was unconstitutional. The court further noted that

> Plaintiffs have introduced affidavits of expert witnesses showing that in some instances the involvement of parents in a minor's abortion decision will be harmful to both the minor and the family relationship. These affidavits disclose that in some cases parents will pressure the minor, causing

> great emotional distress and otherwise disrupting the family relationship. Id. at 548.

The Maine court also stated that parental notification would cause minors to delay abortion, thereby increasing medical risks, or cause minors to seek out illegal abortionists. *Id.*

Both these decisions reflect the central teaching of *Bellotti*, that is, the minor must be protected in her fundamental right to secure an abortion when she has determined, with her physician, that an abortion will be in her best interests.

The parent-child consultation mandated by a notification requirement supposedly provides the child with her parents' mature view. In the case of a mature minor, however, this Court has recognized her ability to consent, after consultation with her physician, to the abortion procedure. *Bellotti v. Baird*, 99 S. Ct. at 3050. The mandatory involvement of her parents, therefore, should not be a prerequisite to the decision. Even the immature minor must be protected from hostile parental reaction and "she must be permitted to show that an abortion nevertheless would be in her best interest," without parental notification. *Id.*

In recognition of the fact that parental notification and/or consent is not always available or desirable, the common law has evolved a doctrine of the "mature minor" who is capable of giving consent to medical treatment. *Younts v. St. Francis Hospital*, 205 Kan. 292, 469 P.2d 330 (1970); *Smith v. Seibly*, 72 Wash.2d 16, 431 P.2d 719 (1967); *Lacey v. Laird*, 166 Ohio St. 12, 139 N.E.2d 25 (1956); *Gulf & Ship Island R.R. v.*

Sullivan, 155 Miss. 1, 119 So. 501 (1928); *Bishop v. Shurley*, 237 Mich. 76, 211 N.W. 75 (1926). A "mature minor" is generally defined as one who is sufficiently intelligent to understand the nature and consequences of the proposed treatment which must be for the minor's benefit. See *Bonner v. Moran*, 126 F.2d 121 (D.C. Cir. 1941.)* Several states have codified the mature minor standard and, by statute, allow unemancipated minors to consent to medical care even when no constitutional right to sex-related health care is involved. Ark. Stat. Ann. § 82-363 (1973); Miss. Code Ann. § 41-41-3h (Cum. Supp. 1979); N.H. Rev. Stat. Ann. § 318-B:12-a (Supp. 1979).

This Court has recognized that both a mature and an immature minor must be able to obtain an abortion without parental notification. Thus, it was held in *Bellotti* that a mature minor must be able to obtain a court order for an abortion without notification to her parents. Even if a minor is immature, "she must be permitted to show that an abortion nevertheless would be in her best interest" without parental involvement. *Bellotti v. Baird*, 99 S. Ct. at 3050. This Court recognized in *Bellotti* the overriding importance of protecting even the immature minor from the possible adverse consequences of requiring that parents always be informed that their daughter is seeking an abortion.

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* In *Bonner*, a minor consented to donate a skin graft for his cousin. The court held that parental permission was necessary since the operation was not for the minor's benefit. The court recognized that mature minors can give effective consent for medical services which are for their benefit.

II. WHEN NOTIFIED OF THEIR MINOR DAUGHTER'S PREGNANCY, NOT ALL PARENTS WILL BE ABLE TO ACT IN THE BEST INTERESTS OF THE MINOR. THE UTAH STATUTE, THEREFORE, DOES NOT PROMOTE HEALTH CARE IN THE BEST INTEREST OF THE MINOR.

The Utah notification statute makes no allowance for situations where the family environment is such that the minor woman cannot realistically turn to her parents for support. Although the Utah Supreme Court characterizes the statute as only "encouraging . . . an unmarried pregnant minor to seek the advice of her parents," *H__ L__ v. Matheson*, slip op., at 9, the effect of the Utah parental notification requirement for too many minor women will be added delay or outright interference with a minor's considered decision to have an abortion.

If parents are notified of their daughter's decision to have an abortion, they may react in keeping with their own beliefs or prejudices, and not in their daughter's best interest.* The teenager's best interest is the standard which this court required in *Bellotti v. Baird*, 99 S. Ct. at 3051.

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* In fact, a survey by the National Center for Health Statistics found that parents do not accurately perceive their minor children's health needs. Parents expressed greater concern over the health of younger children than older, while the statistical presence of significant medical abnormalities increased with the child's age. National Center for Health Statistics, Ser. 11, No. 129, *Examination and Health History Findings among Children and Youths 6-17 Years — United States* 6, 31, 32 (HEW Pub. No. (HRA) 74-1611, 1973). Thus in addition to the problem of parents judging the pregnant minor's situation on the basis of their own prejudices rather than on what is in their daughter's best interest, many would not even comprehend the full range of medical risks which their daughter faces if she continues a pregnancy.

In *Roe v. Wade*, this Court recognized the effect of personal beliefs on an individual's reaction to abortion:

> One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusion about abortion. 410 U.S. at 116.

This observation was expanded in *Bellotti*:

> But many parents hold strong views on the subject of abortion, and young pregnant minors, especially those living at home, are particularly vulnerable to their parents' efforts to obstruct both an abortion and their access to court. 99 S. Ct. at 3050.

Thus, in addition to the problems of dealing with an unwanted pregnancy, a minor will be influenced by the attitudes she encounters among her family. These attitudes will add to the woman's psychological trauma, so that even if her parents do not forbid an abortion, she will fail to seek immediate medical assistance. Bracken and Swigar, "Factors Associated with Delay in Seeking Abortion", 113 Am. J. Obstet. & Gynecol. 301 (1972).

In a home where parents are supportive and there has been open communication and acceptance of sexuality, a minor may be able to turn to her parents at this stressful time. Where the familial situation is such, however, that communication has been impossible before the pregnancy, notifying the parents will not encourage the "consultation" that the Supreme Court of Utah envisions. *H__ L__ v. Matheson*, slip op. at

4. As the Federal District Court of Massachusetts stated,

> If the family relationship is such that communication has not been attempted, or successful, before the pregnancy, we agree with the expert who doubted the efficacy of a last-minute, state-compelled consultation. *Baird v. Bellotti*, 450 F. Supp. 997, 1003 (D. Mass. 1978).

This Court also noted in *Planned Parenthood v. Danforth*,

> Neither is it likely that such veto power will enhance parental authority or control where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure. 428 U.S. at 75.

Unfortunately, as the courts have recognized, parental reactions to a minor daughter's pregnancy can often range from hostility, guilt and anger to outright abuse. Furstenberg, *Unplanned Parenthood: The Social Consequences of Teenage Childbearing* 55 (1976); Osofsky and Osofsky, "Teenage Pregnancy: Psychosocial Considerations", 21 Clinical Obstet. & Gynecol. 1164-65 (1978). Again, the Massachusetts District Court noted the possibility of hostile parental reaction when it said,

> . . . there are a variety of recognized reasons why it would be to a minor's best interests for one or both of her parents to be kept in ignorance of her pregnancy. Parents, physically or emotionally unwell, may be injured by the shock, thus causing the minor deep feelings of guilt. Some parents are

> child abusers; others at least may become actively hostile on such disclosure. Defendants concede, and the evidence shows, that an appreciable number of parents are not supportive. These include not only those who would inflict physical harm, but parents who would insist on an undesired marriage, or on continuance of the pregnancy as punishment. *Baird v. Bellotti*, 450 F. Supp. 997, 1001. See also, *Wynn v. Carey*, 582 F.2d 1375, 1388 n. 24 (7th Cir. 1978).

One study of teenage pregnant women found that their family histories were characterized by broken or chaotic homes. Babikian & Goldman, "A Study of Teenage Pregnancy", 128 Am. J. Psychiatry 755, 759 (1971). Another study discovered that when teenage women were at a high risk of pregnancy,* there was also a high incidence of incestuous or quasi-incestuous relationships between the fathers and daughters. Abernethy and Abernethy, "Risk for Unwanted Pregnancy Among Mentally Ill Adolescent Girls", 44 Am. J. Orthopsychiatry 442, 447 (1974). A requirement of parental notification in such cases is almost unimaginable, yet the Utah statute allows no exception unless it is *physically* impossible to contact the parents.

Another facet of the communication problem is the minor woman's perception of her parents' reaction. The teenager's belief that her parents will not be supportive may derive from her own fears or from attitudes al-

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* "High risk of pregnancy" was defined in terms of teenage women who were sexually active and did not use contraception during the time period of the study.

ready expressed by her parents either openly or covertly. Studies strongly suggest that there is a substantial correlation between parental ignorance or unwillingness to discuss contraception and the minor woman's subsequent misinformation and inability to speak with her parents about her pregnancy. Baudry and Wiener, "The Pregnant Patient in Conflict About Abortion: A Challenge for the Obstetrician", 119 Am. J. Obstet. & Gynecol. 705 (1974); Zelnik and Kantner, "Contraceptive Patterns and Premarital Pregnancy Among Women Aged 15-19 in 1976", 10 Family Planning Perspectives 135 (1978); Zelnik and Kanter, "First Pregnancies to Women Ages 15-19: 1976 and 1971", 10 Family Planning Perspectives 11 (1978).

A survey of teenage attitudes toward sex conducted by Dr. Robert Sorenson found that 72% of the boys and 70% of the girls felt that they could not talk to their parents about sex. Sorenson, *Adolescent Sexuality in Contemporary America* 74 (1973).

The effect of lack of parent-child communication is vividly illustrated by studies of parental notification and contraceptive use among teenagers. These studies found that if parental notification were required for teenagers attending family planning clinics, many teenagers would not attend. Pearson, "Social and Psychosocial Aspects of Extra-Marital First Conceptions," 5 J. Biosoc. Sci. 453 (1973); Tietze, "Teenage Pregnancies: Looking Ahead to 1984", 10 Family Planning Perspectives 205 (1978); Torres, "Does Your Mother Know . . . ?" 10 Family Planning Perspectives 280 (1978).

Fear, shame and inability to communicate with her parents will often cause a minor to employ harmful

means to terminate a pregnancy. The greatest threat to the minor's well-being is that she may be driven to illegal abortionists, who will not inform her parents, or to self-abortion. Kahan *et al.*, "The Effect of Legalized Abortion on Morbidity Resulting from Criminal Abortion", 121 Am. J. Obstet. & Gynecol. 114 (1975); Semmens and Lamers, *Teenage Pregnancy* 14-21 (1968). For these teenagers, the Utah notification statute will have exactly the opposite effect to the one which was desired; it will not protect the minor's health, but rather will severely threaten it.

Another alternative which has been resorted to by many frightened teenagers is suicide. In a 1972 study of teenage suicide attempts, Dr. Teicher found that 22% of the girls who attempted suicide were pregnant or believed they were pregnant at the time of the attempt. This was in strong contrast with a control group of girls who did not attempt suicide. None of the control group were pregnant or believed themselves to be pregnant. Teicher, "A Solution to the Chronic Problem of Living: Adolescent Attempted Suicide", *Current Issues in Adolescent Psychiatry* 136 (Brunner-Mazel 1973).

A third harm that can result from a parental notification statute is that it will add to the documented tendency of minors to delay seeking medical care. See *In Re Diane*, 318 A. 2d 629 (Del. 1974). Adolescents are already over-represented among women receiving second trimester abortions, which pose significantly greater health risks than earlier procedures. Department of Health, Education and Welfare, Decision Memorandum (Schuck Report) (1977). This delay often occurs because the unmarried minor woman, upon

learning that she is pregnant, will react with fear and confusion. Shouse, "Psychological and Emotional Problems of Pregnancy in Adolescence", in *The Teenage Pregnant Girl* 161-68 (Zackler & Brandtadt eds. 1975); Martin, "Psychological Problems of Abortion for the Unwed Teenage Girl", 88 Genetic Psychology Monographs 23 (1973). When a teenager knows that her parents must be notified if she decides to have an abortion, the added stress will often lead to her denying the reality of her pregnancy. See Cates, "Abortions for Teenagers", 1 J. Adolescent Health Care (in press); Baudry and Wiener, *supra*.

Given the many adverse ways in which the notification statute will impact adversely on the minor's decision, as advised by her physician, to have an abortion it is unrealistic for the State of Utah to suggest that the statute requires only a "minimal awareness on the part of the parent." Brief of Respondents, *H__ L__ v. Matheson*, No. 16249, at 5 (S. Ct. Utah).

With respect to those minors who feel that they can inform their parents, the statute is unnecessary, but as applied to those minors who cannot inform their parents, the statute will only injure the family relationship or the minor herself.

III. THE UTAH NOTIFICATION STATUTE SUBSTANTIALLY INTERFERES WITH THE CONFIDENTIAL RELATIONSHIP BETWEEN PHYSICIAN AND PATIENT WHICH IS ESSENTIAL TO THE OPTIMAL PROVISION OF HEALTH CARE, PARTICULARLY WHERE MINOR PATIENTS ARE INVOLVED.

If a minor cannot consult with her parents because of the nature of her relationship with them, and cannot trust her physician to keep her confidences, she will truly have no place to turn. The holding of *Roe v. Wade* that a woman has the right to decide to have an abortion in consultation with her physician, 410 U.S. at 164, will be seriously undermined by the Utah statute.

In many families, children cannot talk freely to their parents about sexual matters. Professional health care personnel may be the only adults to whom the pregnant minor can turn for guidance. Dauber, *et al.*, "Abortion Counseling and Behavioral Change", 4 Family Planning Perspectives 23 (April 1972).

Indeed, the State can further its aims of ensuring essential consultation through funding counseling services in abortion clinics. As one commentator noted,

> This kind of State action largely avoids the constitutional deficiencies of parental consultation and notice provisions. It leaves the mature minor free to make fundamental decisions without parental or judicial interference while providing the less mature child with the type of support and counseling reasonably capable of alerting her to the general risks involved in such decisions.

Note, "The Minor's Right of Privacy: Limitations on State Action after *Danforth* and *Carey*", 77 Col. L. Rev. 1216, 1241 (1977).

Professional counseling services are important not only in deciding whether to terminate a pregnancy, but in assisting the teenager after the decision is made, whether she has an abortion or continues the pregnancy. "(C)onsiderably more emphasis has been given to the psychological effects of abortion than to the psychological effects of carrying through an out-of-wedlock pregnancy and either keeping the baby or giving it up for adoption . . . (M)any females . . . persist in mourning the child whom they have given up for adoption, wishing that they had kept the child and wondering what he or she is like." Osofsky and Osofsky, *supra* at 1164. The physician, nurse and counsellor have been trained to assist the minor in dealing with her psychological and emotional difficulties as well as with her physical health. Baudry and Wiener, *supra*. Physicians and counsellors can maintain an objective viewpoint and can reassure the minor patient that they are there to meet her medical and emotional needs. Kalogerakis, "A Role for the Family Doctor", in *The Emotionally Troubled Adolescent and the Family Physician* 106, 110 (Kalogerakis ed. 1973).

The relationship between physician and patient is a sensitive and private area mandating legal protection. Cooper, "Physician's Dilemma: Protection of the Patient's Right to Privacy", 22 St. Louis U.L.J. 397 (1978). In order that a physician receive the complete information necessary for diagnosis and treatment of a medical condition, the patient must feel that his or her private life will not be available to anyone outside the

physician's office. *Hammond v. Aetna Casualty & Surety Co.*, 243 F. Supp. 793 (D. Ohio 1965); *Berry v. Moench*, 8 Utah 2d 191, 331 P.2d 814 (1958); Note, "Action for Breach of Medical Secrecy Outside the Courtroom", 36 U. Conn. L. Rev. 103, 105 (1967). This is especially true in the case of adolescents who are often sensitive and anxious about the development of their bodies. The consideration granted to adult patients when they seek medical care should not be abrogated simply because the patient is a minor. See *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. at 74-75.

The medical community recognizes the special need of the minor patient to have a confidential relationship with his or her physician.

> (Adolescents) have reached the stage of development where they can profit from, and they badly need, the benefits which a confidential relationship with a doctor of their own affords them. The more the visit can be managed in this way, the more will young people cooperate and the greater will be their own and their doctor's contribution to their own health and to the acquisition of maturity.

Gallagher, "The Care of Adolescents", in *Medical Care of the Adolescent* 57, 64 (3rd ed. Gallagher, Heald & Garell eds. 1977).

When Utah forces parental intrusion into the patient-physician relationship, the physician will find himself in a severe conflict of interest situation. His primary duty is to his patient, the minor woman who may not want to inform her parents. Yet the statute requires him to violate her wishes. Moreover, if the

parents are notified, the physician may be subjected to considerable pressure from them to deny the young woman an abortion which he and she agree is in her best interest. Thus, even if the physician believes that notification of parents would not be in the best interest of the minor woman, he faces a Hobson's choice: either he must contravene his own medical judgment and ethical duty by notifying the parents, or he violates the law by refusing to notify them.* See, Wilkins, "Children's Rights: Removing the Parental Consent Barrier to Medical Treatment of Minors", 1975 Ariz. St. L.J. 31, 69.

Because of the untenable position in which notification and consent statutes have placed the physician, the medical community has called for clarification and liberalization of these laws. Hofmann, "A Rational Policy Toward Consent and Confidentiality in Adolescent Health Care", 1 J. Adolescent Health Care (in press); Kalogerakis, *supra* at 112. As one specialist in pediatric medicine noted,

> The rights of parents pose a dilemma for most physicians. It seems that parents do have a right to know and be concerned about a child's health and what is done by a physician to or for the child. However, confidentiality is necessary if trust is to be established between the physician and adolescent patient. Consequently, violation of this trust can lead to potential danger to an

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* Utah Code Ann. § 76-7-314(3) (1953) provides that the parental notification statute is part of the criminal code. Failure to comply with the notification requirement is punishable by imprisonment not exceeding one year, Utah Code Ann. § 76-3-204(1), and a fine not exceeding $1,000. Utah Code Ann. § 76-3-301(3).

> adolescent's health, to pregnancy, nontreatment of venereal disease, or other conditions dependent on confidentiality. Daniel, *Adolescents in Health and Disease* 160 (1977).

In recognition of the need of minors for confidentiality, a recent American Bar Association study outlined the circumstances where a minor must be able to consent to medical treatment without notification to parents. Those areas include treatment for venereal disease, drug abuse and pregnancy-related treatment, including abortion:

> In dealing with this issue of notification of parents, this standard distinguishes between those types of treatment in which the interests of the parent and the minor will normally coincide and where notification of parents is appropriate and mandatory, and those circumstances where the interests of parent and child conflict . . . In the latter instances, the overriding social interests in enabling the minor to obtain the particular treatment dictate that unless the minor's health will be seriously jeopardized by failing to notify the parents, the minor's objection to disclosure should be honored by the treating physician.

Juvenile Justice Standards Project, Institute of Judicial Administration, American Bar Association, *Standards Relating to Rights of Minors* 56-57 (Draft 1977, adopted, February 1980).*

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* The need for privacy in medical consultation has been highlighted by the introduction of the Medical Records Privacy Act, S.503, 96th Cong., 1st Sess. (1979). In an era of automatic record-keeping and centralized computer systems, the public is justifiably

Not only will the Utah parental notification statute harm the minor woman, but in many instances it will prevent the physician from acting in her best interest. A State regulation affecting minors must always be measured against the best interest of the minor. Here, where the regulation affects abortion, it must also comply with the strict standards that are used to evaluate a regulation which burdens fundamental rights. Under either standard, the Utah statute fails to satisfy constitutional requirements.

IV. SINCE PARENTAL NOTIFICATION MAY FORCE A MINOR TO FORGO OR DELAY AN ABORTION, THUS INCREASING THE HEALTH RISKS, THE UTAH STATUTE BEARS NO RATIONAL RELATIONSHIP TO THE WELL-BEING OF THE MINOR.

If a pregnant woman delays obtaining an abortion either through fear of parental notification or because her parents obstruct her decision, the risks from later abortion will substantially increase. The safest time for termination of a pregnancy is in the first trimester, preferably before eight weeks. " 'The Earlier the Safer' Applies to All Abortions", 10 Family Planning Perspectives 243 (1978). The risks of the abortion procedure increase after the eighth week. The possibility of major and minor complications (total morbidity) increase from 4.55 per 100 abortions at eight weeks to 5.47 per 100 abortions by twelve weeks. Thus, the risks to the woman will have risen 20% by the twelfth week over what they would have been at the eighth week. Cates,

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concerned that their privacy be safeguarded. Teenagers are not any less concerned with their privacy simply by virtue of their minority.

et al., "The Effect of Delay and Method Choice on the Risk of Abortion Morbidity", 9 Family Planning Perspectives 266 (1977).

The risk of major complications increases by an even greater percentage over the combined morbidity risk. The major morbidity risk is .23 per 100 abortions at eight weeks, but increases to .44 per 100 by the twelfth week, an increase of 91%. *Id.* Any obstacles to the woman's decision to obtain an abortion will, therefore, increase the health risks which the woman must face. *Wynn v. Carey*, 582 F.2d 1375 (7th Cir. 1978).

If the delay continues into the second trimester, the methods available for termination are significantly more risky for the woman. Benditt, "Second-Trimester Abortion in the United States", 11 Family Planning Perspectives 358 (1979). By the 16th week of pregnancy, the woman faces health risks from three to fifteen times as great as those faced in the eighth week. Cates, *et al.*, *supra*; Grimes *et al.*, "Methods of Midtrimester Abortion: Which Is Safest?" 15 Int'l J. Gynecol. & Obstet. 184 (1977).

When the abortion decision is made too late, or if parents have made an abortion decision by the teenager and physician impossible to implement, the minor faces significant risks in giving birth to a child. It is important to note that the risk of death for teenagers from pregnancy continuation is five times greater than the risk of death from abortion. Cates, "Abortions for Teenagers", *supra* at 6; Cates and Tietze, "Standardized Mortality Rates Associated with Legal Abortion: United States 1972-1975", 10 Family Planning Perspectives 109 (1978). Studies have shown that adolescent mothers are significantly more susceptible to toxemia,

preeclampsia and eclampsia (a form of convulsions that may lead to death). Andrews, "Problems of Teenage Mothers, Their Infants and Influence of Family Planning", 9 Pediatric Research 257 (1975); Coates, "Obstetrics in the Very Young Adolescent", 108 Am. J. Obstet. & Gynecol. 68, 72 (1970); Katchadourian, *The Biology of Adolescence* 143 (1977). Severe anemia may also be present, McGarity, *et al.*, "Pregnancy in the Adolescent: Preliminary Summary of Health Status", 103 Am. J. Obstet. & Gynecol. 773 (1969), and cephalopelvic disproportions (where the mother's pelvis is not large enough to permit the infant's head to pass), result in a greater number of Caesarian sections. Katchadourian, *supra* at 144; Zackler, *et al.*, "The Young Adolescent as an Obstetric Risk", 103 Am. J. Obstet. & Gynecol. 305 (1969). Risks such as these are exacerbated when the minor is poor and does not have access to intensive medical care, both before and during childbirth. Perkins, *et al.*, "Intensive Care in Adolescent Pregnancy", 52 Obstet. & Gynecol. 179, 186-88 (1978).

Children born to adolescent mothers are often characterized by prematurity, low birth weight and physical and neurological defects. Klein, "Early Teenage Pregnancy, Contraception and Repeat Pregnancy", 45 Am. J. Obstet. & Gynecol. 263 (1974). Perinatal, neonatal and infant mortality have been found to be higher for infants born to teenagers. Dott and Fort, "Medical and Social Factors Affecting Early Teenage Pregnancy", 125 Am. J. Obstet. & Gynecol. 532, 532-33 (1976); Nortman, "Parental Age as a Factor in Pregnancy Outcome and Child Development", 16 Reports Population/Family Planning 37 (Population Council, August 1974). Again, these complications can be somewhat assuaged by the provision of quality

health care, but for the disadvantaged teenager, or the teenager living in an area without adequate health care, the risks to her health and her child are greatly increased.

Aside from the medical risks which the teenage mother and infant must face, there are economic, psychological and social burdens as well. One commentator described the situation of a teenage mother in the following words:

> Adolescents frequently are extremely unrealistic, not only about the changes which pregnancy will produce in their lives, but also about appropriate maternal behavior and good child care. They are not prepared for the social and emotional isolation of motherhood at this early age. The adolescent girl may find herself with no social outlets and no satisfactory personal relationships, since her own peer group is absorbed in school activities and dating. Such a lonely, depressed girl may take her frustrations out on her child, and indeed, the incidence of child battering is greater in this age group. Perkins, *et al.*, *supra* at 185.

Early childbearing often means the end of educational advancement for the woman and thus curtails her employment opportunities. Hardy, *et al.*, "Long Range Outcome of Adolescent Pregnancy" in 21 Clinical Obstet. & Gynecol. 1230 (1978); Card and Wise, "Teenage Mothers and Teenage Fathers: The Impact of Early Childbearing on the Parents' Personal and Professional Lives", 10 Family Planning Perspectives 199 (1978). Teenage mothers frequently are not married and have to raise their children without a husband or

father or other means of support and therefore must turn to public assistance. Moore, "Teenage Childbirth and Welfare Dependency", 10 Family Planning Perspectives 233, 234 (1978).

A recent study found that children born to teenagers have significantly lower cognitive abilities than their counterparts born to older women. Baldwin and Cain, "The Children of Teenage Parents", 12 Family Planning Perspectives 34 (1980). Marriages which result from a teenage pregnancy have a high failure rate. McCarthy and Menken, "Marriage, Remarriage, Marital Disruption and Age at First Birth", 11 Family Planning Perspectives 21, 29 (1979). What is even more surprising is that there is a striking correlation between the mother's age at the birth of the first child and the dissolution of second marriages. Women who had their first child in their teen years were more likely to have their second marriages dissolve than women who had their first child after their minority. *Id.* at 29.

In those circumstances where parents, once notified of their daughter's decision to have an abortion, will interfere with that decision, the Utah statute frustrates the minor's best interest since it may force her to undergo the contraindicated medical risks of a late abortion or childbirth. If the minor's family situation is such that she can confide in her parents, she will do so. If this is not the case in a particular minor's family, the state cannot hope, by statute, to enforce an environment of love and trust. Indeed, the results may be harmful, or even fatal, to the minor woman.

CONCLUSION

For the reasons stated in this brief and in the brief of appellants, *amici* respectfully urge that this Court reverse the judgment of the Supreme Court of Utah and declare Utah Code Annotated § 76-7-304(2) unconstitutional.*

Respectfully submitted,

EVE W. PAUL
c/o Planned Parenthood
Federation of America
810 Seventh Avenue
New York, New York 10019
(212) 541-7800

HARRIET F. PILPEL
437 Madison Avenue
New York, New York 10022
(212) 758-4010

Attorneys for Amici Curiae

Of Counsel:

GREENBAUM, WOLFF & ERNST
437 Madison Avenue
New York, New York 10022

April 10, 1980

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IN THE

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Appeal from the Judgment of the Supreme Court of the State of Utah

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BRIEF OF COALITION FOR THE MEDICAL RIGHTS OF WOMEN, CHINATOWN-NORTH BEACH FAMILY PLANNING SERVICES, INC., AND JUVENILE LAW SECTION OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AS AMICI CURIAE IN SUPPORT OF APPELLANTS.

ABIGAIL ENGLISH
PAULINE H. TESLER
National Center for Youth Law
693 Mission Street, 6th Floor
San Francisco, California 94105
(415) 543-3307
Attorneys for Amici Curiae

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IN THE

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BRIEF OF COALITION FOR THE MEDICAL RIGHTS OF WOMEN, CHINATOWN-NORTH BEACH FAMILY PLANNING SERVICES, INC., AND JUVENILE LAW SECTION OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AS AMICI CURIAE IN SUPPORT OF APPELLANTS.

INTEREST OF AMICI CURIAE*

The Coalition for the Medical Rights of Women is a not-for-profit statewide association of more than 150 California organizations, including patient advocate groups, organizations dedicated to securing and advancing the rights of women, and organizations concerned with caring for women in problems relating to their reproductive capacity. Additionally, the Coalition's membership includes pediatricians specializing in care of adolescent women, as well as over 2500 individuals, many of whom have sought and obtained abortions in the past, and may do so in the future, and many of whom have daughters in and approaching adolescence who either have had or may need to have abortions. The Coalition's goal in all its work is to ensure that all women, young as well as old, are enabled to make informed and unfettered decisions about their reproductive capacity, and are able to receive the best possible medical care to implement their choices. The Coalition works to secure safe and effective birth control, freedom from coerced sterilization, prenatal care, access to childcare facilities and to adequate care for new mothers and their infants, as well as access to skilled medical care to terminate unwanted pregnancies. Through its

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* Written consent for the filing of this Brief Amici Curiae in the form of a stipulation by counsel for Appellants and for Appellees, pursuant to Supreme Court Rule 42(2), has been filed with the Clerk of this Court under separate cover.

sterilization abuse program, the Coalition works to protect young women against parental decisions which could result in sterilization without their informed consent; through its Committee to Defend Reproductive Rights, the Coalition seeks to protect all women, including teenagers, from legislation which would intrude upon the right to choose freely whether or not to bear children.

Amicus Chinatown-North Beach Family Planning Services, Inc., is a California clinic serving primarily San Francisco's Chinese-speaking community. Its staff provides bilingual family planning assistance, counselling, and educational materials to adults and teenagers, and also refers many people who contact the clinic to other agencies, physicians, and clinics in the Bay Area. Many of its clients are teenage women who have in the past needed abortions or who will need them in the future; many of its adult clients have teenage daughters who have had or will need to have abortions. A mandatory parent notification requirement would seriously impair the ability of this clinic to serve its clientele fully and appropriately.

Both the Coalition for Medical Rights of Women and Chinatown-North Beach Family Planning Services, Inc., are appellants in a case pending in the California Supreme Court, entitled Committee to Defend Reproductive Rights v. Myers, (S.F. No. 24069, Petition For Hearing filed July 9, 1979). Among the issues pending

for resolution by that court is whether a requirement that the parents of pregnant minors in the State of California must be notified before a publicly-funded abortion can be performed constitutes a violation of the minors' privacy rights. This Court's disposition of the instant case is likely to have a profound, perhaps dispositive effect upon the pending California appeal.

The National Legal Aid and Defender Association (NLADA) is a not-for-profit organization whose primary purpose is to assist in providing effective legal services to persons unable to retain counsel; amicus NLADA Juvenile Law Section is the division of NLADA which is concerned with the rights of minors. NLADA's members include the great majority of legal services agencies throughout the United States, public defender offices, and coordinated assigned counsel systems. NLADA's membership also includes two thousand individual members, most of whom are private practitioners. In its attempt to provide effective legal services to the poor, NLADA necessarily must defend against governmental attempts to limit the reach of constitutional protections, because it is always the poor who are most immediately affected by such incursions, and who are least able to defend against them. Teenagers, who rarely have independent financial resources, are a significant client group of NLADA's members. Because the primary purpose of NLADA is to ensure that those without financial resources have access to

equal justice, the NLADA Juvenile Law Section, on behalf of the clients of its members, has a unique interest in ensuring that the government not act to deprive teenagers of free access to rights secured by the Constitution, including the right of privacy. Moreover, since NLADA members would be the principal resource for pregnant teenagers who might be obliged to secure legal counsel in order to obtain an abortion which their parents oppose, and since the Juvenile Law Section of NLADA is acutely aware of the unavailability of sufficient legal counsel resources for such teenagers in many parts of the country, amicus NLADA Juvenile Law Section has a specific interest in ensuring that obstacles not be interposed which, directly or indirectly, might require pregnant teenagers to resort to court proceedings in order to obtain abortions.

Amici Curiae thus bring to this action a thorough familiarity with the issues in this case as well as in similar cases. Amici believe that the issues raised in this case present important questions of national significance, questions which are of concern to young girls everywhere, not only to those in Utah. Amici believe that by their participation in this action they can bring before this Court considerations which will assist the Court in deciding the important questions raised by this appeal.

SUMMARY OF ARGUMENT

Mandatory parental notification in every case where a minor seeks an abortion violates pregnant minors' right of privacy, which includes the right to decide to terminate a pregnancy by abortion, free of unwarranted state intrusion. This privacy right extends to minors as well as adults. Both aspects of the privacy right, the interest in avoiding disclosure of sensitive matters and the interest in independent decision-making, are burdened by mandatory parental notification.

For many pregnant teenagers who do not wish their parents to know of their abortion, the requirement of notification is indistinguishable in its impact from a requirement of consent. A significant number of minors will suffer substantial harms rather than permit their parents to be notified. The technical impairment of the privacy interest occasioned by mandatory disclosure is exacerbated by the harm which may result to the minor and to the family from disclosure. Moreover, a pregnant minor's interest in independent decision-making may be undermined where parents exert psychological pressure against abortion, or where they take practical steps to impede her ability to obtain an abortion.

Even though the notice requirement may deter only some pregnant minors from exercise of their right to choose a safe, lawful abortion, a

less than absolute barrier which significantly burdens the right to decide whether to bear children is still unconstitutional. Moreover, the Utah statute does interpose an absolute barrier in the form of criminal penalties for physicians unless notification takes place prior to the abortion.

The notice requirement also will deprive some minors of the opportunity to obtain necessary medical care. Some will remain pregnant; others may delay seeking abortion, seek it through illegal channels, attempt self-abortion or suicide, or run away. Whether or not each individual is correct in her judgment that suffering these risks is preferable to notifying her parents is immaterial in terms of the harm actually worked by the notice requirement.

The Utah notice requirement also deprives pregnant minors seeking abortions of the equal protection of the law. Utah discriminates arbitrarily between minors who seek therapeutic abortions and minors who seek all other pregnancy-related care, requiring only those who want abortions to disclose their situation to their parents. This distinction is irrational and underinclusive, because childbearing is acknowledged to present significantly greater risks to the health and welfare of minors than early abortion. Moreover, teenagers carrying their pregnancies to term are permitted by Utah law to consent to procedures far more dangerous than early abortion, and to give birth to new

life, without any notice to parents. Also, the law distinguishes irrationally between married and unmarried pregnant minors. The ostensible purpose of the notice requirement is to enhance medical judgment, but the aribtrary distinctions drawn by the statute suggest that the notice requirement actually has little to do with that purpose.

Both the burden on minors' privacy rights with respect to abortion, and the denial of equal protection involved in the statute's classifications, give rise to a very stringent standard of constitutional scrutiny. The state must show that the notice requirement serves a significant state interest not present in the case of an adult, that the restriction actually furthers the interest, and that the interest cannot be furthered by less intrusive measures. The Utah law cannot meet this stringent standard.

The reasons justifying somewhat lesser scrutiny of infringements upon the privacy rights of minors than upon those of adults are concerned almost exclusively with advancing the welfare of those minors. Thus, to be sufficient justification for the notice requirement, the interest or interests advanced by the State of Utah must relate to enhancing the health and welfare of the minor, and must actually be furthered by the notice requirement. Each of the interests which might be suggested in defense of the Utah statute is deficient in at

least one of these respects.

First, the interest in assuring that minors make the abortion decision carefully is not advanced by the notice requirements. Mature minors who are capable of making the abortion decision independently are already engaging in responsible decision-making. Minors who are deterred by the notice requirement from seeking abortion through legal channels will not seek out their parents for consultation; the result of the requirement is exactly the opposite of encouraging responsible decision-making by pregnant minors. Those whose parents, once notified, react with hostility or violence will not be aided thereby in the process of making a weighty and difficult decision. Minors who are deterred from obtaining medically desirable abortions will be harmed in many ways by the requirement; those who refuse to notify their parents, but still persist in seeking an abortion, also suffer substantial harm as a result of the notification requirement. The state can have no interest in encouraging parent consultation regarding the abortion decision when the result is harm to the health and welfare of many pregnant teenagers.

Second, the notice requirement fails to advance the interest of parents in guiding the upbringing of their children. No autonomous parental interest unrelated to the minors' welfare can constitute sufficient justification for the notice requirement when the result of notice

will be detrimental to the health and welfare of minors in many instances. The weighty parental interest in promoting the health or welfare of the minor is frustrated rather than served by the requirement in an appreciable number of cases.

Finally, the notification requirement fails to advance the physician's best medical judgment. The terms of the statute do not require that the physician receive any information whatever from parents. Moreover, notification as the price of medical care will impair the trust essential for a successful physician-patient relationship and prevent delivery of high-quality medical care. Also, a physician whose medical judgment is that a minor will be harmed by parental notification is rendered powerless by the statute to exercise any medical judgment at all.

Existing provisions of Utah law, professional standards, and constitutional safeguards of parental rights are more than adequate to ensure that a teenager's decision to have an abortion will be a careful one. Utah law requires that physicians consider a broad range of factors, provide extensive information, and satisfy themselves that consent is truly informed, prior to performing an abortion. The provisions of existing law and professional standards are sufficient to protect the immature minor as well as the mature minor. The constitutional protections afforded the parental

interest in childrearing ensure that parents can have as much input as they desire into their children's thinking about pregnancy and abortion. Additional provisions to ensure responsible decision-making by pregnant teenagers are, in the view of amici, unnecessary.

Mandatory notification of parents in every case is a sledge-hammer approach. The Utah legislature could, if it wished, enact alternative provisions which would not unduly burden the privacy right of minors and which would further the state's important goals of improved adolescent decision-making, parental involvement in an important decision, and enhanced medical judgment. One such alternative approach is suggested in the Juvenile Justice Standards adopted by the American Bar Association. The approach taken by the Standards preserves the essentially medical nature of the abortion decision and extends as much protection as possible, consistent with the protection of her health, to the minor's privacy rights, while nevertheless encouraging, as opposed to requiring, parental involvement. Where less intrusive means exist to further important state interests, the Constitution does not permit the type of wholesale invasion of minors' privacy rights which the Utah mandatory requirement of parental notification creates.

ARGUMENT

I. THE PRIVACY RIGHT OF MINORS IS SUBSTANTIALLY INFRINGED BY A MANDATORY REQUIREMENT OF PARENTAL NOTIFICATION WHICH APPLIES IN EVERY CASE OF A MINOR SEEKING AN ABORTION.

A. The Right of Privacy Concerning the Decision Whether to Bear a Child or Terminate a Pregnancy Extends to Children as Well as Adults.

One aspect of the liberty protected by the Due Process Clause of the Fourteenth Amendment is the right of privacy 1 / which, as this Court has definitively recognized, encompasses the right to decide whether to bear or beget a child. Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965). The right has been explicitly interpreted by this Court to include the right to decide to terminate a pregnancy by abortion, free from

1 / The right of privacy is not, of course, a unitary right; nor is it grounded solely in the Due Process Clause of the Fourteenth Amendment; it emerges from the shadows and penumbras of numerous constitutional clauses and amendments. L.Tribe, American Constitutional Law at 893 (1978). Whether it is a single right or a cluster of constitutionally protected interests, however, privacy concerns some of the most basic and intimate needs of human beings for autonomy and control of their own bodies. Id. at 889, 921.

unwarranted government intrusion. 2/ Roe v. Wade, 410 U.S. at 154. With respect to decisions regarding procreation, and specifically the abortion decision, the right of privacy has been held to extend to minors as well as adults. Bellotti v. Baird, 99 S.Ct. 3035 (1979) [hereinafter Bellotti II]; Carey; supra, Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) [hereinafter Danforth]; Bellotti v. Baird, 428 U.S. 132 (1976) [hereinafter Bellotti I].

The right of privacy encompasses two distinct, though closely related interests: the individual interest in avoiding disclosure of sensitive matters, and the interest in independence in making certain kinds of important decisions. Whalen v. Roe, 429 U.S. 589, 599-600 (1977). From the perspective of a pregnant teenager who wishes to have an abortion, both of these interests are implicated by a mandatory

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2/ The right in question is, essentially, a right to choose—to decide whether to seek an abortion or bear a child—rather than a right to an abortion as such. As succinctly stated by this Court in Carey v. Population Services International, 431 U.S. 678 (1977) [hereinafter Carey], "The decision whether or not to beget or bear a child is at the very heart of [the] cluster of constitutionally protected choices. That decision holds a particularly important place in the history of the right of privacy[.]" 431 U.S. at 685.

requirement that her parents receive notice of her decision to terminate her pregnancy. 3 / Compulsory notice to parents deprives a minor of the right to decide to whom and under what circumstances the fact of her pregnancy will be revealed, and further subjects her to a serious risk that her autonomy in decision-making will be limited. While certain intrusions upon the

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3 / Utah law provides that

> no abortion may be performed in this State without the concurrence of the attending physician, based on his best medical judgment[,]

Utah Code Ann. §76-7-303 (1978), and that

> To enable the physician to exercise his best medical judgment, he shall:
> (1) Consider all factors relevant to the well-being of the woman upon whom the abortion is to be performed, including, but not limited to,
>
> (a) Her physical, emotional and psychological health and safety,
> (b) Her age,
> (c) Her familial situation.
>
> (2) Notify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed, if she is a minor, or the husband of the woman if she is married[,]

Utah Code Ann. §76-7-304 (1978), and imposes criminal penalties upon the physician for performing an abortion upon a minor without giving the required notice to her parents. Utah Code Ann. §§76-7-314(3); 76-3-204(1); 76-3-301(3) (1978).

constitutional rights of children have been viewed by this Court as permissible, 4 / it is nonetheless established that infringements of minors' right of privacy, particularly when the interests affected involve a decision to obtain an abortion, will not withstand constitutional scrutiny if they constitute an undue burden upon the right. Bellotti II, 99 S.Ct. at 3046; Bellotti I, 428 U.S. at 148. Amici will demonstrate that mandatory parental notification creates just such an undue burden.

B. A Mandatory Requirement of Parental Notification for Abortions Performed Upon Minors Significantly Burdens Their Right of Privacy.

From the perspective of a pregnant teenager who has decided, in consultation with a physician, to obtain an abortion, a requirement of parental notification is virtually indistinguishable from a requirement of parental consent. 5/ Confronted with the necessity for involving their parents as the price of securing an abortion, an unknown but significant number of minors in this category will prefer to suffer substantial harms rather than permit their

4 / See, e.g., Bellotti II, 99 S.Ct. at 3044; Carey, 431 U.S. at 693, n. 15.

5/ Footnote on next page.

parents to be informed. 6 /

For a variety of reasons, some pregnant teenagers are simply unwilling, under any circumstances, to have their parents know that

5 / In considering the requirement of mandatory parental notification, it is useful to divide the affected pregnant teenagers into three groups: (1) those who would not mind if their parents were informed; (2) those who object to notification and presume correctly that their parents would be hostile or unsupportive; and (3) those who incorrectly presume that their parents will be unsupportive but who are adamant in their refusal to risk parental knowledge. It is the latter group which highlights most clearly the manner in which a notice requirement is virtually indistinguishable from a consent requirement. For the minor who will go to any lengths to avoid notification to her parents, neither the fact that in some ultimate legal sense the "decision" is hers, nor the fact that her parents in actuality would be supportive is particularly relevant. The notification requirement will be as insuperable an obstacle to her access to an abortion as the "absolute limitation on the minor's right to obtain an abortion" which constitutes the fatal defect of a consent requirement. Danforth, 428 U.S. at 90. (Stewart, J., concurring).

6 / The Utah statute imposes no duty upon a physician to notify parents unless he or she intends to perform an abortion. Hence, by foregoing the safe, legal abortion the minor could avoid the necessity for notifying her parents.

they are pregnant, 7 / or that they have decided to have an abortion. Others may be less concerned about the fact of knowledge but will, correctly or incorrectly, assume that if their parents were to learn of their decision to have an abortion they would exert extreme pressure, or take decisive action, to prevent the abortion. For these two groups of pregnant teenagers at least one of the privacy interests—in non-disclosure of personal information or in

7 / It is obviously true that minors who are deterred by the notice requirement from obtaining abortions will be caught in a Catch-22: as pregnancy advances, their parents will learn of their pregnancy without formal notification. But, because of their stage of cognitive development, some minors may not be able to think through the logical implications of each course of action. See, Cobliner, Shulman, and Romney, The Termination of Out-of Wedlock Pregnancies and the Prospects for their Primary Prevention, 115 Am.J.Obstet.Gynecol. 432, 442 (1973). Whether or not their avoidance of abortion under these circumstances is entirely rational, the deterrent effect of the notice requirement is nevertheless real. By no means all minor females fall into this group; many are perfectly mature, and able to exercise rational decision-making about their predicaments. Some of these will be willing to inform their parents of their pregnancies; others may recognize and accept that unless they notify their parents about the desired abortion, the parents will discover the pregnancy in any event after abortion is no longer a feasible alternative; still others may justifiably conclude that the risks attendant upon notification are not worth encountering, even compared with the risks of other alternatives. See infra at 23, n.18.

independent decision-making—is implicated, and, as amici will demonstrate, substantially infringed.

The infringement of the privacy interest in non-disclosure occasioned by the mandatory notice requirement is complete: a minor who wishes to obtain the abortion must accede to notifying her parents. The harm represented by even a technical impairment of the privacy interest which would result from unwilling disclosure may well be exacerbated by the impact of the disclosure upon the family relationship. This Court noted in Danforth that "the very existence of the pregnancy" could be responsible for fracturing the family structure, 428 U.S. at 75, and thus implicitly recognized that serious harms may result to the minor and to the family 8 / as a consequence of the violation of the minor's privacy interest in non-disclosure. See also, Bellotti II, 99 S.Ct. at 3048; Baird v. Bellotti, 450 F.Supp. 997, 1001 (1978),

8 / In a recent opinion holding unconstitutional Louisiana's requirement of parental notification for minors of ages fifteen to seventeen who seek abortions, one judge recognized: "In many cases the notice requirement will cause family disharmony because it will inform parents who may oppose their daughter obtaining an abortion, yet those parents will be legally powerless to prevent their daughter from obtaining an abortion." Margaret S. v. Edwards, ___ F.Supp. ___, No. 78-2765, Slip op. at 25 (E. D. La. Feb. 29, 1980).

aff'd, 99 S.Ct. at 3035 (1979) (hereinafter Baird); Wynn v. Carey, 582 F.2d 1375, 1388, n. 24 (7th Cir. 1978).

The other aspect of the privacy interest—that which insures independence in making certain kinds of important decisions, Whalen v. Roe, 429 U.S. at 599-600—is also implicated, and burdened, by the mandatory parental notice requirement. This Court has recently recognized that practical limitations on minors' capacity to consent to abortion are inherent in a parental notification requirement which applies in every case:

> ... [M]any parents hold strong views on the subject of abortion, and young pregnant minors, especially those living at home, are particularly vulnerable to their parents' efforts to obstruct both an abortion and their access to court.
>
> Bellotti II, 99 S.Ct. at 3050.

The prerogatives of parental authority may make it difficult, if not impossible, for many minors to effectuate an abortion decision, once their parents have learned of their intent to do so. Parents can exert psychological and emotional pressure, threatening ostracism from the family, for example, if the daughter persists with her chosen course of action; they can also take practical steps to prevent her obtaining the abortion for which she has the legal right to consent. By committing a pregnant daughter to a

mental hospital 9 / or sending her to a boarding school or away to visit relatives, parents might be able to delay or totally prevent an abortion; similarly, they may, by restricting the availability of funds, prevent her from reaching a clinic or hospital. Amici do not mean to suggest that all parents will act in such a harsh or unreasonable manner. Many will not do so, and many will be helpful and supportive to their daughters in a time of stress. Amici are not concerned with those cases, however, but rather with the cases, which undeniably exist, in which the risk of harm which would result from the impairment of the privacy interest in independent decision-making is great.

The fact that a mandatory requirement of parental notification is not an explicit authorization of a parental veto does not prevent it from being an undue burden on the right of pregnant minors to choose whether to bear children. Restrictions on the exercise of a fundamental right which are less than absolute may nevertheless constitute impermissible infringements of the right. 10/ Thus, the fact that the notification requirement will constitute a

9 / Parents generally have the right to commit their children to mental facilities. See e.g., Ellis, Volunteering Children: Parental Commitment of Minors to Mental Institutions, 62 Cal. L.Rev. 840, 850 (1974).

10/ Footnote on next page.

deterrent to abortion for only some, rather than all, pregnant teenagers, does not enhance its constitutionality. In Danforth, for example, not every parent would have exercised the arbitrary veto power and withheld consent; nevertheless the fact that some would have done so rendered the requirement unconstitutional. And there can be little doubt that at least some minors will be deterred by Utah's mandatory notice statute from seeking medical care or obtaining an abortion. 11/ Moreover, there is a significant aspect of the Utah statute which does constitute a total restriction upon the minors privacy right; it interposes an absolute

10/ As this Court stated in Carey:

> [L]ess than total restrictions on access to contraceptives that significantly burden the right to decide whether to bear children must also pass constitutional scrutiny.
>
> 431 U.S. at 697.

11/ Commenting upon mandatory parental consultation as an alternative to a parental veto power, the U.S. Court of Appeals for the Fifth Circuit concluded that:

> . . . merely facing one's parents with the problems of unwanted pregnancy would present a considerable deterrent to abortion among teenage girls and, in fact, may adversely affect their mental and physical health and thereby arguably infringe upon the minor's constitutional rights.
>
> Poe v. Gerstein, 517 F.2d 787, 793, n.11 (5th Cir. 1975).

barrier to abortion, in the form of criminal penalties imposed upon physicians, unless a minor is willing to permit notification. 12/

Not only does the requirement of parental notice impinge upon the minor's privacy interest by compelling disclosure of personal information and by limiting the minor's ability to make an important decision independently, it may also deprive the minor of the opportunity to obtain necessary medical care. 13/ Many minors, out of fear of parental involvement for the various reasons discussed above, will avoid seeking medical care through legitimate channels when

12/ Thus, one way of viewing the burden on minors' privacy rights imposed by the Utah requirement is that deterrence of abortion, and therefore childbirth by default, are significant and foreseeable results of Utah law, secured not permissibly, through use of incentives, c.f. Maher v. Roe, 432 U.S. 464, 474 (1977) ["The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there."], but impermissibly, through state-imposed criminal penalties.

13/ Minors may well have a constitutionally protected liberty interest in access to medical care to preserve and enhance their health. This interest, which at least in this instance requires for its effectuation the ability to consult with a physician in strict confidentiality, would thus be infringed by the notice requirement. The impairment of the minor's liberty interest in health would also impinge upon the physician's professional duty of confi-

they discover or suspect that they are pregnant; 14/ others may delay in seeking medical care, 15/ seek it through illegal channels or undergo extreme health risks by attempting to abort themselves: 16/

13, cont'd./
dentiality. See infra at 47. The need to apply the professional duty of maintaining confidentiality to physicians' relationships with children as well as with adults has been widely recognized. See, e.g., Gallagher, The Care of Adolescents, in Medical Care of the Adolescent at 64 (3d ed. 1977); Perr, Confidentiality and Consent in Psychiatric Treatment of Minors, 4 Journal of Legal Medicine 9, 12 (June 1976); A. Hodder, Legal Issues in Pediatrics and Adolescent Medicine at 144 (1977). There is, therefore, a close relationship between the privacy interests of minors, the dictates of professional ethics with respect to confidentiality, and the ability of the physician to provide timely, appropriate, high quality medical care to a minor patient, particularly in an area as sensitive as pregnancy and abortion.

14/ See, e.g. Alice v. SDSW, 55 Cal.App.3d 1039, 128 Cal.Rptr. 374 (1976).

15/ See, Bracken and Kasl, Delay in Seeking Induced Abortion: A Review and Theoretical Analysis, 121 Am. J. Obstet. and Gynecol. 1008, 1013 (1975).

16/ See also, Paul, Pilpel, and Wechsler, Pregnancy, Teenagers and the Law, 1974, 6 Fam. Plan. Perspectives 142, 145 (1974).

> The consequences of refusal to perform an abortion on a minor may be very serious, since a girl who is intent on abortion is quite likely, if denied one by a physician, to turn to an illegal abortionist or attempt to abort herself. Either action may have serious, possibly life-threatening effects. A. Hodder, supra, at 285.

In short, amici submit, the burden on the privacy right of minors which results from the notice requirement is substantial. Some minors who are mature enough to become pregnant, and able under Utah law to consent to an abortion, are nonetheless concerned above all else that their parents not learn of their pregnancies. 17/ Some of these teenagers are correctly assessing a hostile, abusive, or otherwise unsupportive response to be likely from their parents. 18/ Others incorrectly fear such a response. Some of the latter are relatively mature, and some are not. But for all of them, the subjective perception is the

17/ See, Baird v. Bellotti, 393 F.Supp. 847, 853 (1975), vacated and remanded, 428 U.S.132 (1976).

18/ See, e.g., State v. Koome, 84 Wash.2d 901, 530 P.2d 960 (1975) [parents wished to deter daughter from subsequent pregnancies by forcing her to bear child]; Jolly, Young, Female and Outside the Law, in Teenage Women in the Juvenile Justice System: Changing Values at 102 (1979) ["When a young girl becomes pregnant, many families refuse to allow her back into their home . . . Institutionalization is all too often the only available alternative . . ."];

same: they will not permit their parents to be notified, and either they are paralyzed into inertia by their dilemma, thus delaying abortion until it is no longer a safe choice, or they believe the various alternatives—running away, suicide, self abortion, back-alley abortions (all of which are far more dangerous than an early therapeutic abortion) to be preferable to informing their parents. Utah law permits them to make this decision. Indeed, for girls in this position (and common sense and available studies indicate that the size of the group is far from negligible)—Utah law virtually dictates that they will endure a more dangerous alternative than a safe abortion, with no adult guidance at all in making that choice.

For these girls the right of privacy is unquestionably infringed. 19/.

18/ cont'd
cf. Sparkman v. McFarlin, 552 F.2d 172 (7th Cir. 1977), rev'd sub nom. Stump v. Sparkman, 435 U.S. 349 (1978), rehearing denied, 436 U.S. 951 (1978) [mother sought and obtained order authorizing sterilization of fifteen-year old daughter to prevent possible pregnancy].

19/ The various ways in which this infringement occurs were recently documented on the record in a recent case invalidating a parental notice requirement similar to Utah's. Women's Community Health Center, Inc. v. Cohen, 477 F.Supp. 542, 548 (D.Maine 1979).

II. THE UTAH PARENTAL NOTIFICATION STATUTE CREATES CLASSIFICATIONS WHICH DISCRIMINATE ARBITRARILY BETWEEN SIMILARLY-SITUATED PREGNANT MINORS IN THEIR EXERCISE OF A FUNDAMENTAL RIGHT.

Utah law permits female minors of any age or marital status to consent to any medical care which is given in connection with pregnancy or childbirth, including abortion. Utah Code Ann. §78-14-5(4)(f) (1953). However, the requirement of mandatory notice to parents, which is superimposed upon this basic scheme only for minors who seek abortions, sets up a classification which arbitrarily separates minors who seek therapeutic abortion from minors who seek all other pregnancy-related medical care. Utah Code Ann. §76-7-304(2) (1978). The effect of this statutory classification is to burden substantially the exercise of the fundamental privacy right of pregnant minors to decide for themselves whether or not to bear children; as will be shown below, (Point IV, infra, at 35-48), no significant state interest is advanced by the classification which outweighs the extreme detriment to the fundamental interests of pregnant minors which amici have shown the notice requirement to work in a significant proportion of cases. The statute thus unconstitutionally denies unmarried pregnant minors seeking abortions the equal protection of the laws.

The code provision is vastly underinclusive. First, Utah's law does not require physicians to notify the parents of pregnant

minors who consent to any aspect of pregnancy-related care other than abortion. It is generally agreed that from both a medical and a socio-economic point of view, childbearing presents more severe risks of harm to teenage mothers than to older women, 20/ and is commonly more dangerous to maternal health than first trimester abortion. Nonetheless, the physician is not directed by Utah law to notify parents of young women who choose childbirth over abortion, even though their choice may run directly contrary to the physician's best medical judgment, and even though many parents might ally themselves with the physician in this situation to urge that their daughters consider abortion more carefully. 21/

20/ See infra at 39-41.

21/ Amici do not believe that the decision to undergo abortion is any weightier than the decision of a young woman, herself possibly still a child, to give birth to new life, and on that ground, urge this Court to reject as irrational a statutory scheme which deters the former choice while in effect encouraging the latter. Consider, for instance, the absurd reality that under Utah law a hypothetical eleven-year old girl who, deterred from an early abortion by the notification requirement, gives birth to a child--without any parental involvement in that decision--is at the moment of birth empowered by Utah law to make all decisions, medical and otherwise for that new being, Utah Code Ann. §78-14-5(4)(a) (1953), a mere nine months after the state of Utah has statutorily refused her the means to implement a decision on her own part not to assume such responsibility over another being's life, unless she first notifies her own parents.

Second, many young women who carry pregnancies beyond the point of safe early abortion experience medical conditions requiring interventions far more dangerous and intrusive from a medical standpoint than early abortion. 22/ Under Utah law, a pregnant minor of any age can consent, for example, to amniocentesis, Caesarean section delivery, fetal monitoring devices, as well as care for spontaneous abortion and miscarriage, toxemia, placenta previa, ectopic pregnancy, and a variety of other high-risk medical conditions without any notification to her parents that such treatment is taking place. Surely, if parental notice in all cases were thought to be necessary to ensure sound medical judgment where abortion is contemplated, the same considerations would apply even more strongly to these other forms of medical care involving far greater risk of harm. 23/

22/ See, e.g., Alan Guttmacher Institute, 11 Million Teenagers, at 21-23, 62 (1976).

23/ The analysis presented in this section focuses on the irrationality of the Utah notice requirement in terms of an asserted legislative purpose of enhancing the physician's medical judgment, because this purpose is the only one which appears on the face of the statute. Other possible state purposes—some asserted by respondents below, others not, to amici's knowledge, asserted by the State of Utah in justification of the statute—are analyzed below, Point IV, infra, at 37-45, and shown to be insufficient to justify the burden upon the privacy rights of pregnant teenagers.

Third, the Utah code distinguishes between married and unmarried pregnant minors in a wholly irrational manner. Utah Code Ann. §76-7-304(2) (1978). 24/ Utah law would require a sixteen-year old girl who is unwed and who desires an abortion to involve her parents in the fact of her pregnancy and abortion, while a sixteen-year old girl, otherwise identically situated, who is married need not have her parents notified. 25/ Instead, the law mandates notice to her husband, without reference to how young he may be. Whatever the actual

24/ The statute is somewhat ambiguous in drawing the distinction. It is unclear whether, for a married pregnant minor seeking abortion, the physician is mandated to notify the husband instead of the parents, or whether the physician is left to choose between notifying the parents and notifying the husband. In either case, the distinction between married and unmarried minors discriminates arbitrarily. Marital status has been held by this Court to be an impermissible basis upon which to impose burdens upon the right of privacy in matters related to procreative choice. Eisenstadt v. Baird, 405 U.S. at 453.

25/ Even though a young woman who is married obviously has no reason to keep private the fact that she is sexually active, she may well wish her parents not to know of an intended abortion, because of an anticipated negative reaction or outright opposition. She may wish to protect the parents or herself from the resulting emotional stress; she may even fear obstruction of her plans, if, for example, she is still economically dependent despite her marriage.

purpose behind this distinction may be, it cannot reasonably be construed to enhance the physician's medical judgment. Both hypothetical young women are identically situated with respect to a legislative presumption that the physician's medical judgment would somehow be improved by notification of parents. 26/ A husband who is possibly as young as the pregnant girl, and who may know nothing at all about her medical history, cannot reasonably be regarded as able to contribute to the exercise of the physician's medical judgment; yet the Utah law regards him as equivalent to the parent for this purpose. 27/ Utah's notification requirement, in short, is greatly underinclusive in terms of

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26/ Of course, there are many distinctions between married and unmarried minors, emancipation being perhaps the most obvious. However, Utah distinguishes between married and unmarried minor females for an ostensible purpose to which the fact of marriage is wholly unrelated: enhancing a physician's medical judgment. In a similar context, one court has observed, "The State's concern that a minor receive parental guidance about a prospective abortion is undermined when a significant segment of pregnant minors is not afforded that guidance. In short, the statute distinguishes between two classes of minors without any showing of justification for the distinction." Wynn v. Carey, 582 F.2d at 1387.

27/ This statutory equivalency assigned to parents and spouses strongly suggests that the actual purpose of the notification provision in reality has little to do with exercise of medical judgment. The only sense in which a juve-

its purported purpose to ensure that the physician is given an opportunity to receive information which might enhance a medical judgment about a teenager's abortion. 28/

The classifications set up by the notification requirement, then, discriminate arbitrarily and irrationally between various groups of pregnant minors in the exercise of their fundamental privacy rights. Amici will show that this arbitrary distinction gives rise to very stringent judicial scrutiny (Point III, infra, at 31-34), and that under such scrutiny, the requirement is fatally defective (Point IV and Point V, at 35-63).

27/ con't.
nile spouse of a pregnant girl can be considered similarly situated to her parents is with respect to his own personal interest in the unborn fetus, and his own personal feelings about abortion. Viewed in that light, neither his autonomous interest, nor that of the pregnant young woman's parents, is important enough to justify invasion of the pregnant girl's fundamental right to privacy, with the attendant serious harms. See Point IV, infra, at 39-41 and 43-44.

28/ The lack of connection between notice to parents and receipt of information from them is discussed infra, at 46-47.

III. BOTH THE BURDEN ON THE FUNDAMENTAL RIGHT OF PRIVACY, AND THE ARBITRARY DISCRIMINATION BETWEEN SIMILARLY SITUATED CLASSES OF MINORS WITH RESPECT TO EXERCISE OF THAT RIGHT, WHICH RESULT FROM THE UTAH PARENTAL NOTICE REQUIREMENT, GIVE RISE TO A VERY STRINGENT STANDARD OF CONSTITUTIONAL SCRUTINY.

Normally, an infringement of the fundamental right of privacy in the area of reproductive choice can only withstand constitutional scrutiny if it is necessary to further a compelling state interest. E.g., Roe v. Wade, 410 U.S. at 154; Carey, 431 U.S. at 688. In the case of minors, some deviation from the stringent standard of review required for adults is permissible. See, e.g., Carey, 431 U.S. at 693, n. 15. The test for determining the constitutionality of state regulation interfering with the privacy rights of minors in the area of pregnancy and abortion is whether the regulation serves a "significant state interest . . . that is not present in the case of an adult." Danforth, 428 U.S. at 75; Carey, 431 U.S. at 693.

It is not sufficient for the state merely to proffer in support of its restrictive legislation an appropriate state interest which is a significant one; it must also demonstrate that the restriction in question actually furthers that interest, and is narrowly drawn to serve only that interest:

> [W]hen a State, as here, burdens the exercise of a fundamental right, its attempt to justify that burden as a rational means for the accomplishment of some significant State policy requires more than a bare assertion, based on a conceded complete absence of supporting evidence, that the burden is connected to such a policy.
>
> Carey, 431 U.S. at 696.

This standard is a very stringent one. Applying it, this Court has invalidated every state statute presented to it in recent years which has significantly burdened the privacy rights of minors with respect to procreation. Bellotti II, supra; Carey, supra; Danforth, supra. Moreover, unusually careful scrutiny is required when the challenged restriction affects the ability of a minor to seek an abortion, since "the abortion decision differs in important ways from other decisions that may be made during minority." Bellotti II, 99 S.Ct. at 3047. Thus, in order to withstand this Court's stringent scrutiny, Utah's limitation upon the privacy rights of pregnant teenagers who wish to obtain abortions must demonstrably further a significant state policy which cannot be furthered by less intrusive measures; this, as amici will show, it cannot do.

Similarly, the basic framework for analysis of a claim that a statute fails to provide for the equal protection of law guaranteed by the Fourteenth Amendment is well settled:

> We must decide, first, whether [state legislation] operates to the disadvantage

> of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the constitution, thereby requiring strict judicial scrutiny.
> San Antonio Indep. School District v. Rodriguez, 411 U.S. 1, 17 (1973).

As amici have shown, a significant burden upon the fundamental right of privacy is imposed upon certain classes of minors by the Utah notification requirement. See supra, at 14-24. Consequently, this case technically falls within the criteria articulated in Rodriguez for application of strict judicial scrutiny. However, this Court has held, in the context of violations of the Due Process clause of the Fourteenth Amendment, that a significant state interest not present in the case of an adult may serve to justify a burden upon a minor's fundamental rights which might otherwise fail to survive the strictest scrutiny. Danforth, 428 U.S. at 75. But it is quite clear from this Court's opinion in Bellotti II, that while strictest judicial scrutiny may be somewhat relaxed in such a case, nonetheless burdens which as a practical matter impede a minor's ability to secure an abortion require extremely great justification. Where, as here, a denial of equal protection of the laws is asserted, the standard of review can surely be no less stringent.

Amici believe that the "significant state interest" test delineated in Danforth, and applied in Bellotti II, is substantially the same

as the "critical examination" which this Court brought to bear for equal protection purposes upon the state interests advanced in support of the statutory classification challenged in Zablocki v. Redhail, 434 U.S. 374, 383 (1978). Rather than seeking a "compelling state interest" to support the differential classification which burdened the fundamental right to decide to marry, this Court in Zablocki described the appropriate standard of review as follows:

> When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.
>
> 431 U.S. at 388.

Amici submit that this is the equal protection standard of review that should be applied here.

IV. NO STATE INTEREST CAN BE ADVANCED IN SUPPORT OF UTAH'S MANDATORY PARENTAL NOTIFICATION REQUIREMENT WHICH IS ADEQUATE TO JUSTIFY THE INTRUSIONS UPON THE PRIVACY RIGHTS OF PREGNANT MINORS

While a somewhat lesser standard of constitutional scrutiny may be required for invasion of the privacy rights of children than is required for intrusions on the similar rights of adults, it is equally clear that the rationale for permitting this lesser standard defines the type of state interests which may be advanced to justify such invasions. 29/ The state must advance an interest in support of the notice requirement which contributes significantly to the welfare of the minors affected by it. It would be absurd to suppose that any state interest unrelated to assuring the welfare of the pregnant teenager could provide a permissible justification for conditioning abortion on parental notification, since the reasons justifying limitations on constitutional rights of children—e.g. the vulnerability of children,

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29/ The reasons for permitting greater limitations on the constitutional rights of children than of adults have been most recently articulated as: "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child-rearing." Bellotti II, 99 S.Ct. at 3043.

and the importance of assuring wise decision-making by or on behalf of minors—are concerned almost exclusively with the welfare of the children. 30/

Moreover, because the parental notification requirement is a limitation upon a minor's ability to obtain an abortion, the health of the minor must be the paramount consideration in evaluating any state interest proposed for its justification. 31/ Any state interest which does not further the health or welfare of pregnant teenagers who wish to obtain abortions will be inadequate to justify mandatory notice to their parents. Thus, in order to vindicate the notice requirement, a state interest must enhance the health and welfare of the minor, and must actually be furthered by the requirement. 32/ Amici will demonstrate that each of the

30/ "Where minors' rights have been held subject to curtailment by the state in excess of that permissible in the case of adults it has been because some peculiar state interest existed in the regulation and protection of children, not because the rights themselves are of some inferior kind." State v. Koome, 84 Wash.2d at 904, 530 P.2d at 263 (emphasis added).

31/ At no stage of pregnancy does any state interest, including its interest in the potential life of the fetus, outweigh the interest in maternal health. Roe v. Wade, 410 U.S. at 164-165.

32/ Carey, 431 U.S. at 696.

three legitimate state interests— assuring careful decision-making by a pregnant minor, 33/ fostering the parental role in childrearing, 34/ and enhancing the physician's best medical judgment 35/—which might be suggested in defense of the Utah statute is deficient in one of these respects.

A. The Mandatory Notice Requirement Does Not Serve the State's Interest in Assuring that Minors Make The Abortion Decision Carefully.

The assumption underlying the State's right to "limit the freedom of children to choose for themselves in the making of important affirmative choices with potentially serious consequences[,]" Bellotti II, 99 S.Ct. at 3044, is that minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them. Danforth, 428 U.S. at 102 (Stevens, J., concurring and dissenting). There are numerous ways, however, in which a mandatory requirement of parental notification, though it might be intended by the legislature to encourage parental consultation as an aid to responsible decision-making by the minor, is inappropriate for that purpose.

33/ Bellotti II, 99 S.Ct. at 3044.

34/ Id. at 3045.

35/ This ostensible purpose appears on the face of the statute itself. Utah Code Ann. §76-7-304 (1978).

Utah has already determined that the decision to obtain an abortion is the prerogative of the minor to make in consultation with her physician. Utah Code Ann. §78-14-5(4)(f) (1953). Thus, the state has already concluded that pregnant minors, in general, have the capacity to make the abortion decision with the assistance and advice of a physician. Accordingly, with respect to those minors who are mature, and capable of making the decision independently, the requirement of notice is unnecessary to achieve the state's interest in responsible decision-making. 36/

To the extent that minors are deterred from seeking abortion through legitimate channels, the notice requirement will not encourage them to turn to their parents for consultation and advice in making the abortion decision. On the contrary, they will run away, attempt self-abortion, seek out illegal abortions, commit suicide, or simply wait and do nothing, allowing the decision to be made by default. For that group the requirement will have had exactly the opposite of its intended effect. Moreover, in the case of those minors who do permit their parents to be notified, but whose

36/ To the extent that some individual minors are immature, or otherwise incapable of making the choice and giving effective consent to the surgery, the common law requirements of informed consent and the standards of the medical profession provide sufficient protections for the minor against her own immaturity or improvidence. See Point V, infra, at 49-52.

parents react with shock, hostility, anger, hysteria, or even violence, the requirement will not enhance the minor's decision-making process. An extreme and overwhelmingly negative parental response is very unlikely to aid the minor in the process of making a weighty and difficult decision.

As already noted, serious harms will result in those cases where minors are deterred from seeking medical care or where the parents are notified and take decisive action to prevent the abortion from occurring. 37/ Teenagers who bear children undergo elevated risks to their health as a result of pregnancy and childbirth. 38/ Additionally, the infants born to young teenage mothers are at greater risk of prematurity, low birthweight, and other developmental defects than those born to women in their twenties. 39/ Moreover, the social, psychological, and economic burdens attendant upon teenage motherhood are enormous and have been amply

37/ Bellotti II, 99 S.Ct. at 3048; Wynn v. Carey, 582 F.2d at 1388 n. 24; Women's Community Health Center, Inc. v. Cohen, 477 F.Supp. at 548; Baird, 450 F.Supp. at 1001-1003.

38/ See, e.g., Menken, The Health and Social Consequences of Teenage Childbearing, 4 Fam. Plan. Perspectives 45 (1972); Alan Guttmacher Institute, supra, at 22-23 (1976).

39/ See, e.g., Dott and Fort, Medical and Social Factors Affecting Early Teenage Pregnancy, 125 Am.J. Obstet. and Gynecol. 532 (1976).

documented. 40/ As this Court recognized in Bellotti II:

> [T]he potentially severe detriment facing a pregnant woman . . . is not mitigated by her minority. Indeed, considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor. . . . In sum, there are few situations in which denying the minor the right to make an important decision will have consequences so grave and indelible.
>
> 99 S.Ct. at 3048.

The alternatives are equally bleak if the minor is unwilling to notify her parents but persists in her intention of having an abortion. She may delay in seeking the abortion until she can overcome her fear of disclosure to her parents; and each week of delay in obtaining an abortion occasions a 20% increase in the risk of complication and a 50% increase in the risk of death. 41/ Alternatively, she may attempt self-abortion or may seek out an illegal abor-

40/ See, e.g., Furstenberg, The Social Consequences of Teenage Parenthood, 8 Fam. Plan. Perspectives 148 (1976); Trussell, Economic Consequences of Teenage Childbearing, 8 Fam. Plan. Perspectives 184 (1976).

41/ See, e.g., Cates and Tietze, Standardized Mortality Rates Associated With Legal Abortion: United States, 1972-1975, 10 Fam. Plan. Perspectives 109 (1978).

tion, with potentially devastating consequences to her health or even perhaps her life. 42/ She may even be driven to commit suicide or to attempt it. 43/ It must be apparent from the foregoing that, except in those cases where the minor permits notice to her parents and they do provide helpful advice, the state interest in responsible decision-making is not furthered by the Utah statute; in each of the scenarios suggested, bad decisions would be made, at least partially as a result of the statute's imposition of a blanket notification requirement. The state cannot have an interest in encouraging parental consultation regarding the minor's abortion decision when the result of doing so would be harmful to the minor's health and welfare. 44/

42/ See, e.g., Baird, 450 F.Supp. at 1001; Hodder, supra, at 285; Poe v. Gerstein, 517 F.2d at 793, n. 11.

43/ See, e.g., Gabrielson, et al., Suicide Attempts in a Population Pregnant as Teenagers, 60 Am. J. Pub. Health 2289 (1970). The state must not be permitted to inflict childbirth, or the risk of death from illegal or self-abortion, upon teenage girls, in effect as a punishment either for their own fear of notifying their parents or for their parents' implacable opposition to abortion.

44/ Therefore, the requirement is impermissibly overbroad in that it requires notification in every case. Bellotti II, supra; Wynn v. Carey, supra; Akron Center for Reproductive Health v. City of Akron, 479 F.Supp. 1172 (N.D. Ohio

B. The Interest of Parents in Guiding the Upbringing of Their Children is Not Served by the Notification Requirement.

Parents have a substantial constitutional interest in directing the upbringing of their children, inculcating moral and religious values and preparing them for the responsibilities of adulthood. See, e.g., Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). Nevertheless, in the context of the minor's abortion decision this parental interest is limited 45/ in two ways. First, "[a]ny independent interest which the parent may have in the termination of the minor daughter's preg-

44/ cont'd.
1979); Women's Community Health Center, Inc. v. Cohen, supra; Margaret S. v. Edwards, supra. The statute also, in effect, creates a conclusive presumption that all minors seeking abortions would benefit from consultation with their parents. Where, as here, such a presumption burdens the exercise of the fundamental right to choose whether to bear a child, it is constitutionally impermissible under Cleveland Board of Education v. LaFleur, 414 U.S. 632, 640 (1974).

45/ This Court's opinion in Bellotti II makes it indisputably clear that it is at bottom the state's concern with the well-being of the minor which is the necessary justification for state efforts to involve parents in the abortion decision: "parents. . .who have [the] primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility." 99 S.Ct. at 3046. (Citation omitted, emphasis added).

nancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant." Danforth, 428 U.S. at 75. Second, parents cannot have a legitimate interest in restricting a minor's access to abortion where to do so would impose a substantial burden upon her health. 46/

The authority of parents over their children is by no means unlimited. See, e.g., Wisconsin v. Yoder, 406 U.S. at 234; Prince v. Massachusetts, 321 U.S. 158, 170 (1944). Because the harms which may result from teenage pregnancy and childbirth are so substantial, a successful parental attempt to discourage or prevent a daughter's abortion might very well "jeopardize the health and safety of the child, or have a potential for significant social burdens." Wisconsin v. Yoder, 406 U.S. at 234. It is under precisely those circumstances that parental authority may be limited. Some parents may try to deter a pregnant daughter from

46/ Comment, The Minor's Right to Consent to Medical Treatment: A Corollary of the Constitutional Right of Privacy, 48 So.Cal. L.Rev. 1417, 1439 (1975). The parental right to guide and control their children's upbringing does not include a right to injure them. L. Tribe, supra, 850-851, 935 (1978). This remains true even when parents wish to withhold consent for medical treatment based upon religious objections. See, e.g., In re Green, 448 Pa. 338, 292 A.2d 387 (1972); In re Sampson, 65 Misc.2d 658, 317 N.Y.S.2d 641 (Fam. Ct. 1970).

obtaining an abortion for insubstantial personal reasons of their own. 47/ That, of course, is not permissible. However, even more weighty parental interests must yield to the extent that they do not foster the minor's welfare. For example, parents' religious objections to abortion, no matter how fervent, cannot be given precedence over the child's own constitutional rights, when to do so would be to the detriment of the minor's health.

In short, there is no autonomous parental interest which could legitimately constitute sufficient justification for a mandatory parental notification requirement. 48/ and the

47/ For example, parents' desire for a grandchild, or to teach their daughter a lesson, could not as a matter of constitutional law outweigh the daughter's privacy interest or interest in health. There is, of course, nothing in the Utah statute which requires that parental input into the abortion decision, if any, be shaped by the best interests of the minor rather than by the independent views of the parents. See, State v. Koome, 84 Wash.2d at 908, 530 P.2d at 265 [father opposed minor daughter's abortion based on his belief that continuing her pregnancy would deter her from becoming pregnant in the future].

48/ This Court should not assume that the existence of a fundamental parental interest in the nurture of their children means that a state's mandatory notice to all parents of an impending abortion automatically furthers that interest.

only permissible parental interest which might theoretically be sufficiently weighty—that of safeguarding and promoting the health or welfare of the minor—is in an appreciable number of cases demonstrably not served by the requirement. 49/ If the actual impact of the means chosen by the state to encourage parental involvement is to harm a significant proportion of the pregnant minors involved, then the justification for intrusion upon the privacy right disappears, regardless of the nominal good intentions of the statute.

48/ cont'd
In effect, Utah's requirement is a conclusive presumption that all parents would want to be informed prior to an abortion, even if the requirement generates a significant risk that their daughter would refuse treatment rather than submitting to the mandatory notification. Many parents might well take the position that proper nurture of their adolescent daughters requires the state to leave the family alone in its decision-making, rather than subverting the emerging autonomy of the teenage young woman in so sensitive an area of development as her sexual identity, and rather than subjecting their daughters to significant risk of the physical and other harms indicated supra, at 38-41.

49/ Those minors whose parents, after an involuntary notification, do agree with their abortion decision, may or may not benefit from the requirement in terms of enhanced family solidarity. Parents, after all, may concede that abortion is in a daughter's best interest and still inflict the many other harms which courts and commentators have recognized to occur; see, e.g., Osofsky and Osofsky, Teenage Pregnancy:

C. The Physician's Best Medical Judgment is Not Enhanced by the Utah Statute.

Although couched in terms of assisting the physiciar to exercise medical judgment, the Utah statute is not even rationally related to achieving that goal, much less tailored narrowly to effectuate only that goal. The Code requires that all pregnant minors who desire abortions must permit their parents to be notified prior to the abortion being performed. However, the statute by its terms mandates a potentially empty act. A telephone call moments prior to performing the abortion would satisfy the terms of the law; nothing in the statute requires that the physician actually confer with the parents, or receive any information whatever from them. He could, consistent with the terms of the law, refuse to have any conversation whatever with them about the proposed abortion. Thus, the

49/ cont'd
Psychosocial Considerations, 21 Clin. Obstet. and Gynecol. 1161 (1978) [parental anger may be so intense as to drive a daughter to leave home]; Smith, The Role of the Grandmother in Adolescent Pregnancy and Parenting, 45 J. of School Health 278, 281 (1975) [some parents refuse to communicate further with daughters upon learning of a pregnancy]; Baird, 450 F.Supp. at 1001 ["Parents, physically or emotionally unwell, may be injured by the shock, thus causing the minor deep feelings of guilt. Some parents are child abusers; others at least may become actively hostile on such disclosure. . . .an appreciable number of parents are not supportive."].

notification requirement by its own terms compels nothing which advances the asserted goal of enhancing the physician's medical judgment.

Moreover, where a physician has required notification as the price of medical treatment, it seems likely that the trust essential for a successful physician-patient relationship will be impaired to some degree. It has long been recognized that a patient is not likely to bring to the therapeutic relationship the candor and trust essential for effective treatment if there is a fear that personal information will be disclosed to others, 50/ particularly if serious familial reproach is a likely consequence. 51/ This impaired trust potentially diminishes not only the immediate ability of the physician to deliver the highest quality medical care for the pregnancy, but also, in all likelihood, the willingness of a minor and her peers to seek a physician's care for other sex-related problems.

Additionally, a physician who believes that the minor's interests will be served by an abortion, and that serious harms would in fact result from notifying her parents, is rendered powerless by the statute to exercise any medical

50/ See, AJI-ABA Juvenile Justice Standards Project, Standards Relating to Rights of Minors, Commentary to Standard 4.2 at 55 (Tent. Draft, 1977) (hereinafter Rights of Minors). This volume was adopted by the American Bar Association in February, 1979.

51/ Id., Commentary to Standard 4.8, at 73.

judgment at all, because it is couched in mandatory terms. As amici will demonstrate below, vhere are far less intrusive means available to the state to further the interest in sound medical judgment, as well as the other potential purposes of the statute.

V. BECAUSE LESS INTRUSIVE MEANS EXIST FOR FURTHERING EACH INTEREST CONCEIVABLY ADVANCED BY THE NOTICE REQUIREMENT, THE UTAH STATUTE FAILS TO MEET THE CONSTITUTIONAL REQUIREMENT THAT IT BE NARROWLY TAILORED TO INTRUDE AS LITTLE AS POSSIBLE UPON THE EXERCISE OF FUNDAMENTAL RIGHTS.

A. Absent the Notice Requirement, Existing Law Provides Significant and Sufficient Safeguards To Ensure That Pregnant Minors Engage In Informed and Reasoned Decision-Making, and That A Physician Performing An Abortion Upon A Minor Exercises The Best Medical Judgment.

If the offending provision of Utah law did not exist, remaining provisions of the Utah code, together with common law principles of informed consent, physicians' professional ethics, and constitutional safeguards of parental rights, provide a baseline of protections which go very far indeed to ensure that a teenager's decision to have an abortion will be made in light of all considerations relevant to her physical and emotional health and future well-being.

Utah law mandates that a physician contemplating performing an abortion must take into account all of the broad-ranging considerations which this Court, in Doe v. Bolton, 410 U.S. 179, 193 (1973), has indicated are relevant to a woman's decision whether or not to terminate a pregnancy. Utah Code Ann. §76-7-304(1) (1978). Moreover, Utah law goes further, to require that physicians must inform the pregnant woman contemplating abortion about stages of fetal development, and about available adoption services in the locale. Utah Code Ann. §76-7-305(2) (1978). Additionally, Utah's generally-applicable informed consent statute adopts the emerging common-law approach of focusing on the informational needs of a person in the patient's position, rather than the custom of the physician, in determining what must be disclosed to a patient in order to elicit her informed consent. 52/ Utah Code Ann. §78-14-5 (1)(f) (1953).

Thus, Utah has ensured that a minor who may be uncertain about whether or not abortion is the best medical choice, or who may have moral or ethical reservations about abortion, will in the course of conferring with her physician be led to consider all relevant factors as part of

52/ See generally, Note, Restructuring Informed Consent: Legal Therapy for the Doctor-Patient Relationship, 79 Yale L.J. 1533, 1555-1560 (1970); Holder, The Minor's Right to Consent to Medical Treatment, 41 Conn. Med. 579, 581 (1977); T. Beauchamp and J. Childress, Principles of Biomedical Ethics at 70-77 (1979).

the abortion decision. These are significant protections for the welfare of pregnant minors, and ensure that their decisions will be made far more carefully with respect to an abortion than with respect to other forms of pregnancy-related care to which they are authorized by law to consent without any special counseling by the physician.

Additionally, of course, the medical profession itself is becoming increasingly sensitive to the central decision-making role of the patient in medical treatment; in recent years, the concept of information-sharing and communication as fundamental to truly informed consent has become incorporated into professional standards, ethical guidelines, and professional literature. 53/ These mandates are not going unheeded. For example, a recent study of the behavior of physicians in counseling pregnant patients seeking abortions revealed that more than 50% of those surveyed spent from thirty minutes to "as much time as needed" counseling

53/ See, e.g., American Hospital Association, A Patient's Bill of Rights §3 (1973), in 4 Encyclopedia of Bioethics at 1786 (1978); National Association of Children's Hospitals and Related Institutions, Pediatric Bill of Rights, Art. 4, 11, in 4 Encyclopedia of Bioethics at 1786-1787; Vaccarino, Consent, Informed Consent and the Consent Form, 298 N. Eng. J. Med. 455 (1978); Cassell, Informed Consent in the Therapeutic Relationship: Clinical Aspects, in 2 Encyclopedia of Bioethics at 767; Note, Restructuring Informed Consent: Legal Therapy for the Doctor-Patient Relationship, supra, at 1533.

individual patients regarding alternatives to abortion, and another 30% of the physicians surveyed spent from fifteen to thirty minutes individually counseling each patient. 54/ Nathanson and Becker, Physician Behavior as a Determinant of Utilization Patterns: The Case of Abortion, 68 Am.J.Pub. Health 1104, 1109, Table 4 (1978).

Moreover, Utah law protects not only the young woman who is able to engage in clear and rational decision-making about her pregnancy, but also the young woman with doubts or with impaired capacity, whether from immaturity or from some other cause. Some young women may exhibit uncertainty about whether or not they want an abortion; but since Utah's statutory delineation of the requisites for informed consent compels a physician to ensure that a patient is consenting intelligently and voluntarily before he/she can carry out a contemplated treatment with impunity, Utah Code Ann. §76-7-304 (1978); §78-14-5 (1953), it follows that an ethical and prudent practitioner would be unlikely to perform an abortion on a minor who appeared less than certain about wanting

54/ One court has explicitly recognized the considerable counseling role which a physician often plays with pregnant adolescents, concluding, "[t]hus, in the usual situation, the minor will not be acting without counsel or guidance." Wynn v. Carey, 582 F.2d at 1387 n. 22.

one, since she could not be regarded as intelligently and voluntarily consenting. 55/ Also, of course, if a minor requesting an abortion appeared in the physician's judgment incapable of exercising informed consent on her own behalf, whether because of extreme immaturity or for some other reason, Utah law, Utah Code Ann. §78-14-2(c) (1953), §76-7-305(1) (1978), together with ethical and common-law principles should lead the practitioner to refer the minor back to her parents, or to seek a court order providing the consent that the minor was thought incapable of giving. See, e.g., Holder, supra, at 582. Certainly no prudent physician would perform the abortion without some form of surrogate consent in such circumstances. This remains true even though the Utah code removes any presumption, conclusive or otherwise, that a minor per se lacks capacity to consent; for even where there is a presumption in favor of capacity to consent, an individual's actual inability to exercise informed consent ordinarily requires that someone else consent prior to treatment. See, e.g., Gauvey, Leviton, Shuger, & Sykes, Informed and Substitute Consent to Health Care Procedures: A Proposal for State Legislation, 15 Harv. J. Leg. 431, 438-44053, (1978). Even without the challenged notification requirement, therefore, existing law goes very far to encourage responsible decision-

55/ See generally, sources cited in note 53, supra.

making by minors about abortion, and ensures responsible exercise of medical judgment where abortion is concerned.

Moreover, if the notification requirement is found to be unconstitutional, the parental interest in guiding and rearing their children would still enjoy substantial protection under the federal constitution. Parents have a fundamental right to educate their children, to inculcate moral values and to share with their offspring their views about important issues such as abortion, pregnancy, sexuality, and childbirth, see Point IV, supra, at 42-44, and nothing in Utah law would or could prevent parents from discussing such matters with their children throughout childhood as frequently and as intensively as they wish to do so. 56/ This being so, amici submit, concerned parents have guaranteed to them the simplest of remedies for a fear that their teenage daughters will make decisions regarding abortion without parental

56/ At least one court has held that permitting minors to obtain contraceptives without notice to their parents does not violate the constitutional rights of parents to guide their children's upbringing. Doe v. Irwin, 48 U.S. L.W. 2587 (6th Cir. Feb. 26, 1980). While in that case it was the parents who were challenging a clinic's practice of providing contraceptives to minors without notifying their parents, the court found it significant that the clinic's practice did not preclude parents from involvement in their children's sexual and contraceptive activity; it simply did not require it.

guidance: they can communicate their values as persistently and persuasively as they like, whenever they like, without restriction.

In short, amici believe that in light of the significant protections which exist, apart from mandatory parental notification, to ensure responsible and informed decision-making by pregnant teenagers, responsible and informed exercise of medical judgment by physicians, and opportunity for parental guidance in the natural course of intrafamilial discussion and decision-making, it cannot be said that additional provisions which significantly burden minors' privacy rights are necessary to further those objectives.

B. The State of Utah Could, If It Wished, Enact More Narrowly Tailored Provisions To Enhance Its Legitimate And Significant Interests Relating To Teenage Abortion, With Far Less Intrusion Upon The Fundamental Privacy Rights of Pregnant Minors Who Seek Abortion Than is Caused By Mandatory Notification.

Blanket notification of parents in all cases of adolescent abortion is a sledge-hammer approach in a situation where this Court has ruled that "[t]he need to preserve the constitutional right and the unique nature of the abortion decision, especially when made by a minor, require a State to act with particular sensiti-

vity when it legislates to foster parental involvement in this matter." Bellotti II, 99 S.Ct. at 3047. If the Utah legislature considers that beyond the protections of existing law and professional standards of practice, additional measures are required to advance the interests involved in adolescent abortion, the state could, without unduly invading the protected privacy interests of pregnant minors, go to considerable lengths to further the legitimate goals of improved adolescent decision-making, parental involvement, and enhanced medical judgment, without imposing a self-defeating and intrusive blanket requirement of parental notice (and without the necessity for cumbersome and impractical alternatives such as judicial proceedings). 57/ (Text continues on page 58)

57/ While this Court has indicated in dicta in Bellotti II that speedy and confidential court proceedings might be a constitutionally adequate alternative to parental involvement, 99 S.Ct. at 3049-3050, such an alternative would be so impractical for the vast majority of pregnant minors that--as the concurring Justices Stevens, Brennan, Marshall, and Blackmun recognized--a court proceeding may well be a greater burden upon exercise of the privacy right than the mandatory parental involvement which the constitution forbids. Id., 99 S.Ct. at 3054. A young teenager, frightened about her pregnancy and feeling ashamed and powerless, is unlikely to be able to advocate effectively in court on her own behalf. See, Wynn v. Scott, 448 F.Supp. 997, 1004 (N.D. Ill. 1978), aff'd, Wynn v. Carey, 582 F.2d 1375 (7th Cir. 1978). Telling such a young woman she may take her case to court in lieu of involving her parents is equivalent in many

57/ cont'd.
cases to telling her she cannot have an abortion.

While an attorney could represent a minor effectively in such a proceeding, minors do not ordinarily have financial resources to hire attorneys, and for many pregnant minors, there will be no source of free or low-cost legal representation. Nearly three million poor people live in areas where there is no organized legal representation for the poor. Tate, Access to Justice, 65 A.B.A.J. 904 (1979). The former president of the Legal Services Corporation testified recently before Congress that "[t]he capacity of the Legal Services Corporation program is not expected to exceed two million legal matters per year through 1980. The total number of legal problems can be estimated to be at least three times the current capacity of Legal Services Corporation programs, perhaps much greater." Oversight on the Legal Services Corporation: Hearing Before the Subcomm. on Employment, Poverty, and Migratory Labor of the Senate Comm. on Labor and Human Resources, 96th Cong., 1st Sess. 101 (1979) (Statement of Thomas Erlich).

Even where legal services programs exist, many provide no services to children and adolescents. Abuse and Neglect of Children in Institutions, 1979: Hearings Before the Subcomm. on Child and Human Development of the Senate Comm. on Labor and Human Resources, 96th Cong., 1st Sess. 606-607 (1979) (Bull, Legal Services for Children and Youth: An Unmet Need). Others may incorrectly believe that they are not permitted by law to represent minors in such proceedings because of the proscription against legal services lawyers representing women in pursuit of non-therapeutic abortions, 42 U.S.C. §2996(f)(b)(8). The AJI-ABA Juvenile Justice Standards emphasize that "there continue to be jurisdictions in which few juveniles receive

57/ cont'd.
full representation . . . because an adequate pool of capable attorneys does not exist." AJI-ABA Juvenile Justice Standards Project, Standards Relating to Counsel for Private Parties, Commentary to Standard 2.1, at 49 (Tent. Draft, 1976). (This volume was adopted by the American Bar Association in February, 1979).

The practical difficulties, moreover, of maintaining actual confidentiality in small-town proceedings are great, and the necessity for disclosure of the minor's predicament--first to a lawyer, and then to court personnel--is itself likely to deter some minors from court proceedings. Finally, one must question what a judge, skilled as he or she may be in matters of law, could contribute to safeguarding the welfare of a pregnant minor capable of consenting to treatment, that could not be accomplished as well or better by consultation with her physician or other professionals. (The case of Stump v. Sparkman, 435 U.S. 349 (1978), rehearing denied, 436 U.S. 951 (1978), makes it abundantly clear that just as parents sometimes act contrary to the best interests of a minor with regard to her reproductive capacity, so may a judge, and with far greater impunity.) And as to threshold questions of competency for purposes of informed consent, such judgments are a daily element of the practice of medicine. See, e.g., Holder, supra, 41 Conn. Med. at 582. In short, amici urge that if this Court should determine that the Utah notification statute violates constitutional rights of pregnant minors, it not apply the Bellotti II dicta concerning court proceedings in such a way as to suggest that court proceedings would be an appropriate alternative to mandatory notification in this instance.

If the Utah legislature believes that additional safeguards are needed to ensure that decision-making by minors is informed and reasoned, it could easily require individual counseling for a specified time period by a social worker or other appropriate professional, or certification that the physician has personally counseled the minor individually for a specified time period, prior to performing an abortion (and even subsequently, if the state should deem that desirable). 58/

If, beyond this, the state of Utah wished to encourage parental notification for reasons relating either to enhancing the pregnant minor's decision-making process, 59/ or to the distinct and autonomous interest of parents themselves in control over the upbringing of their children apart from any beneficial impact

58/ While, as this Court has observed, there is no reason to assume that most physicians will act other than ethically and responsibly in their practice of medicine, Doe v. Bolton, 410 U.S. at 197-98, provisions such as amici suggest here would be relatively non-intrusive safeguards against minors being rushed impersonally through abortion clinics, if this were a concern of the Utah legislature. (See, Danforth, 428 U.S. at 91-92, n. 2.)

59/ Those minors who want an abortion, but whose own decision would change if they knew their parents would in fact support the pregnancy, and who would tolerate mandatory notification rather than forego legitimate medical care, are the only ones for whom mandatory notification would be likely to result in a more

upon the minor's welfare, 60/ the state could easily and effectively advance these interests by means which encourage parental notification without mandating it in all cases.

One feasible approach has been recommended in the AJI-ABA Juvenile Justice Standards. While either parental notification or parental consent is required under the Standards for nearly all other forms of medical care for minors, the Standards, like the Utah code, permit minors of any age to consent to medical care for treatment related to pregnancy, including abortion. Rights

59/ cont'd.
informed and thus better decision. No characteristic of this group warrants permitting its interests to extirpate the contrary interests of the many other minors who are seriously harmed by the notification requirement, particularly where less intrusive means could accomplish the same end. See Point IV, supra, at 38-41.

60/ The parental interest in control over upbringing of their children is fundamental and warrants solicitous judicial protection against intrusions by the state. But as amici have argued, supra, at 43-44, that aspect of the parental interest which is unrelated to concern for the child's best interest cannot constitute a significant enough interest to warrant diminution of the child's own fundamental rights. The state may attempt to further this autonomous parental interest, because while it is not significant enough to outweigh the minor's own interests, it is surely a legitimate state concern; but in so doing, it may not burden the minor's access to abortion by mandating notification where requiring it will harm the minor.

of Minors, Standard 4.8 A-3, at 70-71. The Standards provide that with respect to sex-related medical care, including pregnancy and abortion, the physician is in the first instance obliged to "seek and obtain the minor's permission to notify the parent." Id., Standard 4.2 B, at 53-54. "If the minor objects to notification of the parent, the physician providing treatment under this Standard should notify the parent of such treatment only if he or she concludes that failing to inform the parent would seriously jeopardize the health of the minor. . . ." Id., Standard 4.8 B, at 71. Moreover, the Standards set forth criteria for determining whether failure to inform the parent in fact would jeopardize the minor's health, including:

a. the impact that such notification could have on the course of treatment;
b. the medical considerations which require such notification;
c. the nature, basis, and strength of the minor's objections;
d. the extent to which parental involvement in the course of treatment is required or desirable.

Id., Standard 4.2 B.1., at 53-54.

Finally, where a physician concludes that notification of the parent is medically required, the Standards mandate that the physician

a. indicate the medical justifications in the minor-patient's file; and
b. inform the parent only after making all reasonable efforts to persuade the

minor to consent to notification of the parent. 61/

While this approach does involve some burden upon minors' privacy rights, the Standards do preserve the essentially medical nature of the abortion decision by reserving it to the pregnant minor and her physician, and do protect the integrity of the physician's clinical judgment; they strongly encourage both physician and minor to inform parents about not only an abortion, but also other pregnancy-related care, and they reserve the final decision about notification to the minor herself. The physician is permitted to override the minor's decision only if he/she has reasonable basis to believe that notification is essential for the minor's health. This approach is only minimally intrusive upon the physician-patient relationship, and upon the minor's privacy rights; those rights are burdened only where a physician believes the intrusion essential to protect the minor's health and well-being.

Amici do not suggest that the Standards would in any sense be needed to protect pregnant minors; in the view of amici, existing Utah law provides more than sufficient protection for the health and welfare of pregnant minors with

61/ In amici's view, protection of minors' privacy rights would additionally require that under no circumstances could the physician notify the parent without informing the minor of his/her intention of doing so.

respect to the decision about whether or not to bear a child. Nor do amici believe the Standards to be the only constitutionally permissible approach which a state might take if it nonetheless wished to encourage parental notification. But the Standards do make clear that more narrowly-tailored and less intrusive means exist for encouraging parental notification, means which respect the minor's privacy rights, further the physician-patient relationship, safeguard the minor's liberty interest in securing the most appropriate medical care, and further the legitimate state interests in protecting a minor's health and welfare, in encouraging involvement of parents in a minor's decisions relating to procreative choice, 62/ and in enhancing a physician's

62/ There is good reason to believe that persuasion would result in notification of parents in at least as many cases as the mandatory requirement would have. The only minors clearly benefitted more than they might be harmed by the notice requirement are those seeking abortion because of an incorrect belief that their parents would not be supportive of a pregnancy, and who will submit to mandatory notification rather than withdrawing from the physician-patient relationship. The increased information which would presumably become available to those minors might change their decision. However, since those minors are by definition not inalterably opposed to parent notification, it seems quite likely that they would agree to notice after experiencing the persuasion required by the Standards. Studies have

medical judgment about abortion. Where less intrusive means exist, the constitution does not permit the wholesale and irrational intrusion into certain unmarried minors' privacy rights which the insensitive and self-defeating Utah code provisions require.

62/ cont'd.
established that as many as 55% of teenagers using family planning clinics voluntarily involve their parents in the decision to seek contraception. Torres, Does Your Mother Know. . .? 10 Fam. Plan. Perspectives 280, 281 (1978). The percentage willing to disclose pregnancy and abortion may differ somewhat from the percentage willing to disclose sexual activity, but it is reasonable to suppose it would remain a substantial percentage, particularly if the physician were required to encourage such disclosure.

CONCLUSION

For all the foregoing reasons, amici respectfully urge this Court to reverse the judgment of the court below. 63/

Dated, April 8, 1980.
San Francisco, California.

Respectfully submitted,

ABIGAIL ENGLISH
PAULINE H. TESLER

Attorneys for Amici Curiae Coalition for the Medical Rights of Women, Chinatown-North Beach Family Planning Services, Inc., and Juvenile Law Section of the National Legal Aid and Defender Association.

63/ Counsel for amici wish to express their appreciation for the assistance of Elizabeth Harrison, Sarai Obermeyer Kahn and Barbara Zuras in the preparation of this brief.

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OCTOBER TERM, 1980

No. 79-5903

H__ L__,

—v.—

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BRIEF OF AMICI CURIAE UTAH ASSOCIATION OF WOMEN AND UNITED FAMILIES FOUNDATION IN SUPPORT OF APPELLEES

LYNN D. WARDLE
J. Reuben Clark Law School
Brigham Young University
Provo, Utah 84602

ROBERT W. BARKER
Wilkinson, Cragun and Barker
1735 New York Ave., N.W.
Washington, D.C. 20006
Attorneys for Amici Curiae

STEPHEN A. HILDEBRANDT
Wilkinson, Cragun and Barker
1735 New York Ave., N.W.
Washington, D.C. 20006
Of Counsel

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Brigham Young University
Provo, Utah 84602

ROBERT W. BARKER
Wilkinson, Cragun and Barker
1735 New York Ave., N.W.
Washington, D.C. 20006
Attorneys for Amici Curiae

STEPHEN A. HILDEBRANDT
Wilkinson, Cragun and Barker
1735 New York Ave., N.W.
Washington, D.C. 20006
Of Counsel

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INTEREST OF THE AMICI

The Utah Association of Women (UAW) is a non-profit, non-partisan, non-sectarian association of women with 116 chapters and more than 1600 members in Utah. Believing that the family is the fundamental unit of society, the UAW and its members are dedicated to strengthening society by strengthening the family.

United Families Foundation (UFF) is a non-partisan, nationwide, non-profit research and education foundation associated with United Families of America. UFF was organized, in part, to "...educate the general public so that all will appreciate more fully the value of maintaining the family unit as the bedrock and strength of this nation, and [to] defend [the family] from all asaults that tend to fragment or weaken [it]..."

Many of the members of the UAW are mothers of teenage girls. They have a profound personal interest in seeing that this Court uphold their right to be notified so as to be able to counsel with their minor daughters in the event that they should become pregnant and choose to have an abortion.

The UAW and UFF believe that the issue presented in this case—whether or not a State legislature constitutionally may provide for parents to be notified before a physician performs a medically and psychologically significant abortion procedure on their unmarried minor daughter—is of extremely profound importance to all parents and families of adolescents. And while the State of Utah has its own interests in supporting the parental notification statute, the separate interests of parents and families also deserve careful consideration.

This brief is submitted as an aid to the Court in preserving valid traditional family relationships, which through time have proven of value to the individuals concerned and to society. Preserving the possibility of parental counsel to a troubled minor goes to the very heart of the family relationship upon which our society and nation are founded. Few would suggest that a minor would be deprived of her constitutional rights by a statute preserving the opportunity for counsel and guidance by the guardian of her property.

Denial of an opportunity for family counsel prior to an abortion is not necessary to preserve a minor's right to choose abortion.

The written consent of the Parties to the filing of this *amicus curiae* brief has previously been filed with the Clerk of Court pursuant to the Rules of the Supreme Court.

SUMMARY OF ARGUMENT

The usual judicial deference to laws enacted by a State legislature, especially concerning domestic relations, is appropriate in this case. The Utah parental notification statute does not significantly burden the exercise of the right of abortion privacy. The right of privacy has never guaranteed to adults, let alone minors, the right to obtain abortions without notification to and consultation with *someone*. By merely requiring that the parents of a pregnant minor—the adults most interested in her well-being—will be notified and have an opportunity to counsel with her about her decision, the Utah law does not interfere with the minor's freedom to consult with other persons, if she so chooses. The statute does not give any third party a veto over the decision of the minor. Since notification of the parents is only required "if possible" the law is not absolute nor will it delay the performance of an abortion on a minor.

Even if an extraordinary standard of judicial review were appropriate in this case, the Court should uphold the parental notification requirement because it is sufficiently related to significant state interests. There is overwhelming evidence that parental notification substantially furthers the well-being of minors. It preserves a relationship that is essential to the development and well-being of adolescents. Parental notification is the golden "mean" between the undesirable extremes of abandoning adolescents and over-restricting them. Pregnant adolescents face especially grave physical and emotional risks from secret abortions, which are linked to patterns of subsequent "replacement" pregnancies and severe emotional distress. Giving parents the opportunity to counsel with their pregnant minor daughters protects adolescents against their vulnerability to the

guiles of their peers and other "friends". Parental notification also enables doctors to exercise their best medical judgment.

Parents are entitled to the support of the law in discharging their responsibility to guide and direct the upbringing of their children. The right of parents to participate, by giving counsel, in the abortion decision of their minor daughter is an integral part of the fundamental right of child-rearing which previous decisions of this Court have recognized. The requirement of parental notification compensates for the centrifugal forces that operate on parent-child relationships during adolescence.

Family integrity is protected by the Utah law. Communication and shared experiences are essential components for stable family relationships. Parental notification is the least intrusive way for the State to balance the interest of the minor, her parents and family. Family privacy is preserved; state intervention is avoided.

The parental notification law is not over-inclusive. The Constitution does not mandate state intervention, in the form of a state-enforced "mature minor" exception, in intra-family consultations nor is such an exception desirable. Giving a public officer the power to make the unavoidably indeterminate and subjective decision regarding the "maturity" or "best interests" of a particular minor only compounds the problem.

Finally, this Court needs to emphasize that the right of abortion privacy is not absolute and that the doctrine of abortion privacy is no license for federal judges to indiscriminately invalidate state laws insuring parental participation in the abortion decision of a minor.

ARGUMENT

I. THE UTAH PARENTAL NOTIFICATION LAW DOES NOT SUBSTANTIALLY INTERFERE WITH THE RIGHT OF ABORTION PRIVACY AND THEREFORE IS NOT SUBJECT TO JUDICIAL LIMITATION.

A. *The Utah Parental Notification Law Would Be Subjected To A Heightened Standard of Judicial Scrutiny Only If It Significantly Burdened The Fundamental Right of Abortion Privacy.*

The initial question that must be addressed in the course of a principled analysis of the issues in this case is whether or not the Utah parental notification law, Utah Code Ann. § 76-7-304(2) (1978), should be subjected to a heightened standard of judicial scrutiny. In *Roe v. Wade*, 410 U.S. 113 (1973) and its progeny, this Court manifestly indicated that legislation dealing with abortion will be subjected to a rigorous standard of judicial examination only if it "infringe[s]", *id.* at 156, "impinges upon" *Maher v. Roe*, 432 U.S. 464, 471 (1971); *Colautti v. Franklin*, 439 U.S. 379, 386 (1979), or "unduly burdens", *Bellotti v. Baird* (I), 428 U.S. 132, 147 (1976), *Maher v. Roe*, 432 US. at 473, 747, a woman's right to make the decision whether or not to have an abortion "free from governmental compulsion", *Maher v. Roe*, 432 U.S. at 473, *Whalen v. Roe*, 429 U.S. 589, 599, 600 (1977), or "free from unwarranted governmental intrusion". *Planned Parenthood v. Danforth*, 428 U.S. 52, 70 n.11 (1976), quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). In cases dealing with other aspects of the same "right of privacy", this Court clearly demonstrated that the degree of governmental intrusion which triggers judicial scrutiny occurs when the legislation "significantly interferes with", *Zablocki v. Redhail*, 434 U.S. 373, 383, 388 (1978), or "significantly burdens", *Carey v. Population Services International*, 431 U.S. 677, 689 (1977), the right of privacy. *See also Maher v. Roe*, 432 U.S. at 472-474. Accordingly, only if the Appellant established that the challenged Utah legislation "significantly interferes" with fundamental rights of minors would it be appropriate to apply an extraordinary standard of scrutiny. Appellant has failed to do so, and inasmuch as the Utah parental notification law does not significantly burden the exercise of constitutional abortion rights by minors, application of a rigorous or extraordinary standard of scrutiny in reviewing this statute is not warranted.

B. *The Right of Abortion Privacy Does Not Guarantee The Freedom To Obtain An Abortion Without Any Consultation Or Disclosure.*

There is no constitutional right to have a completely secret abortion. From its inception, the doctrine of abortion privacy has been predicated on the assumption that a qualified physician will be aware of, and participate in, the abortion decision. *Roe v. Wade*, 410 U.S. at 162-167. Adult women constitutionally may (should) be compelled to disclose the fact of pregnancy to, and obtain the assistance in the act of abortion of, a physician. *Connecticut v. Menillo*, 432 U.S. 9 (1975).

There is no constitutional right to make a completely private abortion decision. "The pregnant woman can not be isolated in her privacy." *Roe v. Wade*, 410 U.S. at 159. In the seminal abortion case, this Court emphasized that "consultation" between a physician and patient is expected to precede the abortion decision. *Id.* at 163. The mandatory informed consent law upheld by this Court in *Planned Parenthood v. Danforth*, required Missouri physicians to *inform* all pregnant women seeking abortions of "the options available and the physicial and psychological ramifications of choosing a particular course of action". *Planned Parenthood v. Danforth*, 392 F. Supp. 1378 (E.D. Mo. 1975), *rev'd in part* 428 U.S. 52 (1976). In approving of that requirement, this Court noted that the State concern that such information be provided to the woman before she made her abortion decision was "desirable and imperative." 428 U.S. at 67. Thus, the requirement of informed consent did not interfere with the constitutional right described in *Roe v. Wade*. 428 U.S. at 89, 90, (Stewart, J., concurring). In later cases this Court upheld other laws describing in even greater detail the information that a woman considering an abortion must receive before she can legally obtain an abortion. *Franklin v. Fitzpatrick*, 428 U.S. 901 (1976) (summary affirmance); *Guste v. Jackson*, 429 U.S. 399 (1977) (per curiam). Thus, the requirement that adult women receive a minimum of consultation before they exercise their

right of abortion privacy does not interfere with that constitutional right.

In the light of the foregoing, it is not surprising to discover that this Court has never suggested that *minors* have a constitutional right to obtain abortions without consultation or notification. *See Planned Parenthood v. Danforth*, 428 U.S. at 75; *Carey v. Population Services International*, 431 U.S. at 693 (concurring opinion of Brennan, J.). Indeed, even the legislative scheme suggested by Justice Powell in his concurring opinion in *Bellotti v. Baird* (II), _ U.S. _, 99 S. Ct. 3035, 3048-3050 (1979), explicitly contemplated mandatory disclosure (to parents or a judge) before *any* minor, including a mature minor, could obtain an abortion. Therefore, it is clear that the Constitution does not mandate that the fifteen year old Appellant be able to obtain a secret abortion without consultation or notification.

C. *The Requirement of Parental Notification Does Not Interfere With A Minor's Right To Obtain Independent Advice And Consultation Regarding An Abortion.*

Since some disclosure and consultation does not interfere with or burden the constitutional right of abortion privacy, the question now before the Court does not concern *whether* mandatory disclosure and consultation is constitutionally permissible, but *to whom*. The critical issue is whether or not the Utah requirement that such disclosure be made to, and as a means of encouraging consultation with, a minor's *parents* significantly interferes with her constitutional right of privacy.[1]

In deciding this case, the Court need not decide that parents have an absolute constitutional right to counsel with their minor children before they obtain an abortion, or that the

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[1] The appellant in this case has alleged that she both notified and counselled with responsible adults before bringing her action seeking relief from the parental notification law. Complaint, paragraphs 7 and 9 (Appendix at 5), Appellants Brief at 3, 10-11.

constitutional doctrine of abortion privacy *requires* parental notification in the case of minors seeking abortions. Rather, the Court is asked only to reach the modest conclusion that a state *legislature* constitutionally *may* require parental notification before a physician performs an abortion on an unmarried minor.

Nor is any issue of minors' rights to seek counsel and services regarding family planning or abortion from non-parental sources implicated in the instant case. Compare *Doe V. Irwin*, _ F. 2d _, 48 U.S.L.W. 2587 (6th Cir. Feb. 26, 1980). The Utah parental notification law does not restrict consultation by a minor with professional counsellors. It does not give parents the *exclusive* right to counsel with their children. It only assures that *at least* the parents, the adults most interested in the ultimate welfare of each minor girl, will have the *opportunity* to counsel with their teenage daughter before she takes the irreversible and serious action of having an abortion. Inasmuch as notification and consultation with *someone* is constitutionally appropriate, and inasmuch as the Utah law is not exclusive or restrictive with respect to who that someone is, it does not substantially interfere with any consultation rights of minors.

D. *The Utah Parental Notification Requirement Does Not Significantly Interfere With A Minor's Personal Abortion Decision Or Her Access To Abortion Services.*

First, the requirement of parental notification does not conflict with the rationale for abortion privacy as stated by the Court in any prior decision. The Appellant and her *amici* have relied heavily on this Court's holding in *Planned Parenthood v. Denforth, supra,* that a Missouri parental consent requirement was unconstitutional. One obvious difference between the Utah law involved in the instant case and the Missouri law invalidated in *Planned Parenthood* is the difference between *consent* and *notification*. That difference is of profound significance for constitutional privacy analysis. *Planned Parenthood* did not suggest that parental participation in the abortion decision of a minor can not constitutionally be required. Rather, this Court

concluded that: "The fault with [Missouri law] is that it imposes a special *consent* provision, *exercisable by a person other than the woman* and her physician, as a prerequisite to a minor's temrination of pregnancy. . ." *428 U.S. at 75 (emphasis added).* The Court emphasized that "*the State does not have the constitutional authority to give a third party an absolute*, and possibly arbitrary, *veto* over the decision of the physician and his patient to terminat the patient's pregnancy...." *Id.* at 74 (emphasis added).

Likewise, the complicated Massachusetts scheme invalidated in *Bellotti v. Baird* (II), *supra*, required parental or judicial *consent* before a minor could obtain an abortion. As Justice Stevens observed in that case: "The differences between two statutes [Massachusetts and Missouri] are few...." 99 S. Ct. at 3054. Massachusetts, unlike Missouri, provided an alternative, a judicial proceeding, to minors whose parents would not consent to their abortions. "But in that proceedings, the Judge [was] afforded an *absolute veto* over the minors' decision, based on his judgment of her best interests." *Id.* (emphasis added).

The Utah parental notification statute does not compell a minor to obtain the consent of anyone before obtaining an abortion. The Utah parental notification statute does not give any third party a veto over the decision of the physician and patient to terminate the patient's pregnancy. The Utah parental notification statute does not disturb the holding of either *Planned Parenthood* or *Bellotti v. Baird* (II), nor does it conflict with the rationale for the doctrine of abortion privacy that has been articulated in the opinions of the Court rendered in *any* of the abortion cases.

Second, the Utah parental notification requirement is not "absolute". The statute provides that notification is required only if it is "possible", and the Utah Supreme Court has interpreted this to mean that parental notification is not required if "under the circumstances, in the exercise of reasonable diligence" the parents cannot be identified or located, or if it is not "feasible or practicable to give them notification. Furthermore, within the

context of what is reasonable under the circumstances, the time element is an important factor, for there must be sufficient expedition to provide an effective opportunity for an abortion." *H- L- v. Matheson*, 604 P.2d 907, 913 (Utah 1978) (also printed in Appendix at 57-58).

Third, the Utah parental notification law does not delay or chill the exercise of a protected constitutional right. Unlike the Massachusetts scheme invalidated in *Bellotti v. Baird* (II), there are no inherent procedural or administrative problems that would cause any delay in the minor's access to abortion. *See* 99 S. Ct. at 3054 (Steven, J., concurring). It does not add to the cost of an abortion. It does not entail the publication of any private facts about pregnancy. If a minor is embarrassed about her circumstances, it is extremely unlikely that her parents (if for no other reason that their own self-interests) would desire to broadcast the situation. And while the parents may want their daughter to see a trusted family physician or counselor, rather than an abortion clinic doctor or "counselor", this clearly lies within the scope of legitimate parental prerogatives and would not involve any more "publication" of private facts than if a minor had to seek such professional assistance "on the street" without any parental consultation.

The *amici's* argument that the Utah parental notification law delays access by minors to abortions because teenagers will hesitate to comply with that requirement, Brief of Amici Curiae Planned Parenthood Federation of America, Inc., et al., (hereinafter "Planned Parenthood Amici Brief") at 20, 21; Brief of Coalition for the Medical Rights of Women, et al., (hereinafter "Brief of Coalition") at 22 n. 15, severely strains the authority they have cited. The Department of Health Education and Welfare, Decision Memorandum (Schuck Report) (1977)[2] only indicates that delayed abortions are common among pregnant teenagers

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[2] The Schuck Report only disapproves of parental *consent* to *contraceptive* services (because "the adolescent must bear most of the risks and consequences of an unintended pregnancy," *id.* at 14) but does *not* reject parental *notification* of abortions. In fact, it *encourages* parental participation. *Id.* at Tab G.

and it was based on conditions *nationwide* not just in Utah where parental notification is specifically required.[3] *That* delay clearly does not result from Utah's requirement of disclosure to parents, but probably from the confusion and fear that normally accompany the delayed realization by a minor that she is pregnant. *See* Shouse *Psychological and Emotional Problems of Pregnancy an Adolescence*, in The Teenage Pregnant Girl, 161-68 (Zackler and Brandtadt eds. 1975); Martin *Psychological Problems of Abortion for the Unwed Teenage Girl*, 88 Genetic Psychology Monographs 23 (1973), cited in Planned Parenthood Amici Brief at 21. The authors of another study cited by *amici* suggested the reason for such delay: "Possibly, the young girl who has never experienced pregnancy, who is unfamiliar with pregnancy symptoms, and who also may have a poorly stabilized menstrual cycle is likely to delay in recognizing that she is pregnant." Bracken and Kasl, *Delay in Seeking Induced Abortion: A Review and Theoretical Analysis*, 121 Am.J.Obstet. and Gynecol. 1008, 1012 (1975). They further observed that: "Recognition of pregnancy may be postponed because of denial, repression, negation or other . . . ego defense mechanisms." *Id.* at 1013. Moreover, the same authors also found that "delay is associated with a more distant relationship with significant others [e.g., parents or partners]." *Id.* at 1012. Thus, a requirement that a pregnant teenage girl must notify her parents may result in her obtaining an *earlier* abortion than if she is left to cope with the fear and confusion on her own. In any event, the studies cited do *not* support the bald assertion that the Utah parental notification law is responsible for (or will locally intensify) the phenomenon that teenagers generally delay seeking abortions.[4]

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[3] One writer suggests that only four states require parental notification before the performance of an abortion on a minor. Torres, *Does Your Mother Know . . . ?* 10 Fam.Plng.Perspectives 280 (1978).

[4] In fact, two authors cited by *amici* specifically questioned the assumption that "strict" laws had any significant correlation with delay in seeking abortion. Bracken and Kasl, *supra* at 1017.

The parental notification statute does not *cause* any delay in obtaining abortions by minors. It only requires notification and that could be completed immediately in every case. (Indeed, inasmuch as the Utah law requires *the physician* to notify the parents, assuming that the physician is responsible and competent, it will be done immediately.) Any delay in obtaining an abortion under the Utah law results from a minor's interruption of the statutory process of notification. That is apparently what occurred in the case at bar: The fifteen year old Appellant went to a doctor seeking an abortion, was advised by him that he would have to notify her parents before performing the abortion, she would not let him do so, and he refussed to perform the abortion. Complaint, paragraphs 7 and 13 (Appendix at 4, 5). Thus, appellant asserts the non sequitur argument that she is "*prohibited* from obtaining the abortion she desires" by § 76-7-304(2) *because* that provision requires her doctor to notify her parents *"and she is unwilling to have him do so"*. *Id.* at paragraph 13 (emphasis added).

Fourth, the Utah law does not single out abortion for discriminatory regulation. Compared to the amount of parental participation required before a minor can obtain virtually any other medical service in Utah, *Planned Parenthood v. Danforth*, 428 U.S. at 80, 81, it is apparent that she has infinitely more freedom to obtain an abortion, for parental *notification* only is required for an abortion while parental *consent* is required for most other medical procedures performed on a minor (including tonsillectomy, treatment of ingrown toenails, and wart removals).[5] The argument that parental notification is not statutorily required before a minor obtains medical assistance for her pregnancy and childbirth, Utah Code Ann. § 78-14-5(4) (f) (1953), is disingenious. *Statutory* notification *obviously* will not

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[5] Medical treatment performed on a minor without parental consent could subject the physician to liability for malpractice or assault and battery under the common law, *see generally*, 61 Am.Jur.2d, Physicians and Surgeons, Etc., § 161 at 289 (1972); under civil statute, Utah Code Ann. § 78-14-5(4) (a) (1953); and possibly even under criminal statutes. *See* Utah Code Ann. § 76-5-102 (1978).

be necessary to achieve disclosure and an opportunity for parental counsel if an abortion is *not* performed.

Finally, the Utah parental notification law does not burden any exercise of the right of abortion privacy because it is substantively neutral. The statute does not require consultation with anti-abortion parents only. It neither prohibits nor requires parents to encourage (or discourage) abortion. It does not even suggest that the state discourages or encourages abortions for minors, only that the state favors parental participation in that decision by the minor. The statute is completely neutral on the question of how parents should counsel their children. Clearly there is no constitutional objection to the state encouraging parental involvement through such a neutral procedural device as the challenged parental notification requirement. *See Doe v. Bellin Memorial Hospital*, 479 F.2d 756, 759, 760 (7th Cir. 1973); *Jones v. Eastern Maine Medical Center*, 448 F.Supp. 1156, 1164 (D. Maine, 1978).

Inasmuch as Utah's parental notification statute does not significantly interfere with any constitutional rights, judicial limitation of this domestic relations provision would be inappropriate. As the Court observed in another abortion case:

> There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.
>
> Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader.

Maher v. Roe, 432 U.S. at 475, 476.

II. EVEN IF THE PARENTAL NOTIFICATION LAW INFRINGED UPON THE PRIVACY RIGHTS OF MINORS, UNDER THE STRICTEST STANDARD OF SCRUTINY THAT COULD BE APPLIED IT WOULD BE INVALID ONLY IF IT WERE NOT SUFFI-

CIENTLY RELATED TO ANY SIGNIFICANT STATE INTEREST.

Since the Utah parental notification law does not infringe upon minors' constitutionally protected abortion rights, judicial scrutiny under the ordinary standard of review is appropriate. The statute would be invalid only if it were arbitrary, capricious and did not logically further any legitimate state interest. *Dandridge v. Williams*, 397 U.S. 471 (1971); *Nebbia v. New York*, 291 U.S. 502, 537 (1934). This tolerant standard of judicial review is a necessary corollary of two fundamental premises of constitutional law: Faith in the democratic system (where the elective branches of government have very substantial responsibility for—and the need substantial discretion in—deciding important social and political questions) and commitment to federalism (the belief that the powers of government should be dispersed between the state and federal units and not concentrated in one or the other). This standard not only encompasses a presumption of constitutionality, *id.* at 538, but defers substantially to the judgment of elected state legislators regarding a permissibility of governmental ends and the appropriateness of particular legislative means. *Maher v. Roe*, 432 U.S. at 479, 480; *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963). Under this tolerant standard of judicial scrutiny Utah Code Ann. § 76-7-304(2) is not invalid for it reasonably advances legitimate state interests.

However, even if a heightened standard of scrutiny were deemed appropriate, *i.e.*, assuming for purposes of argument that it could be said that the Utah law unduly burdens the right of abortion privacy of minors, the strict scrutiny of the "compelling state interest" test would not apply. Rather, a middle standard focusing on "significant state interests" would be applicable.

Because of the special condition and disabilities of minority , statutes restricting the exercise of fundamental constitutional rights by minors are subject to less demanding standard of scrutiny than statutes restricting the exercise of the same rights by

adults. *Planned Parenthood v. Danforth*, 428 U.S. at 74; *Bellotti v. Baird* (II), 99 S. Ct. at 3043. In *Planned Parenthood*, all of the opinions conspicously avoided using the "compelling state interest" test in examining the Missouri parental consent law. In the opinion for the Court Justice Blackmun applied the "significant state interest" standard, 428 U.S. at 75. Likewise, the required nexus between interests identified and the statutory scheme employed to achieve them, in the context of minors, was described as "*likely* [*to*] *enhance*", 428 U.S. at 75 (Blackmun, J., for the Court).[6]

In *Carey v. Population Services International*, Justice Brennan, writing for himself and four other members of the Court, indicated that a statute burdening the exercise of fundamental privacy rights by a minor would be invalidated if the state failed to produce evidence ("more than a bare assertion") that the statute was "a *rational means* for the accomplishment of some *significant state policy*...." 431 U.S. at 696. He further explained the reasons for the middle-level "significant state interest" test utilized in that case and in *Planned Parenthood.*

> This test is apparently *less rigorous than the "compelling state interest" test* applied to restrictions on the privacy rights of adults ... Such lesser scrutiny is appropriate both because of the States' greater latitude to regulate the conduct of children..., and because the right of privacy implicated here is "the interest in independence in making certain kinds of important decisions," ... and the law has generally regarded minors as having a lesser capability for making important decisions....

431 U.S. at 693 n.15 (citations omitted) (emphasis added).

Thus, a middle standard of scrutiny is appropriate when reviewing legislation that infringes upon the constitutionally

[6] The conspicous absence of any reference in *Planned Parenthood* to the "narrowly drawn" or "necessary" nexus required under the "strict scrutiny" test, Roe v. Wade, 410 U.S. at 155, rebuts the suggestion of *amici* that such a rigorous test aplies in the context of the intermediate standard of review. Brief of Coalition at 34 citing *Zeblocki v. Redhail, supra* (which concerned the privacy rights of *adults* to marry).

guaranteed privacy rights of minors. Under this standard, the first concern is whether or not the state interests ostensibly served by the statute are "significant" (i.e., more than merely "legitimate", but not necessarily "compelling"). The second concern is whether or not the legislation enacted is "sufficantly related to" (i.e., more than merely "rationally" related, but necessarily "narrowly drawn" or "necessary" to effectutate) those significant state interests.

Since the highest standard of scrutiny that could be applied if the Utah parental notification statute infringed upon the privacy rights of minors would be this middle level "significant interest" standard, and since the parental notification law of Utah clearly satisfies even that standard of examination, the remainder of this brief will examine the Utah law under that standard. But this is done solely for the purpose of argument, and it bears repeating here that the Utah law does *not* infringe upon any constitutionally protected rights of minors.

III. UTAH HAS SIGNIFICANT AND WELL-RECOGNIZED STATE INTERESTS IN PROTECTING THE WELL-BEING OF MINORS, IN PRESERVING PARENTAL RIGHTS, AND IN SUPPORTING FAMILIES.

The interests protected by the Utah parental notification law are numerous[7] and significant. The Utah parental notification law represents a deliberate and reasonable balancing and accomodation of the major potentially conflicting concerns that exist when an unmarried minor becomes pregnant. As such, it substantially furthers well-recognized and significant state interests in protecting the well-being of minors, in preserving parental rights, and in supporting families and family privacy.

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[7] Appellant's suggestion that the interests to be considered are only those spelled out in the provision itself is wholly without merit. *See Williamson v. Lee Optical*, 348 U.S. 483, 487 (1955); *United States v. Carolene Products Co.*, 304 U.S. 144, 152, 153 (1938).

First, it has long been recognized that states have a profound interest in enacting laws to protect the well-being of minors. See. e.g., Sturges and Burn Manufacturing Co. v. Beauchamp, 231 U.S. 320, 325 (1913); *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925). Going beyond even the common law,[8] this Court has repeatedly acknowledged that states' have a great and legitimate interest in enacting laws to protect the well-being of minors. *Ginsberg v. New York*, 390 U.S. 629 (1968); *Prince v. Massachusetts*, 321 U.S. 158 (1944). Indeed, in *Planned Parenthood v. Danforth*, this court acknowledged that a state's interest in protecting minors in the abortion context was truly a significant interest (the defect in the Missouri mandatory *consent* law being that it was not sufficiently related to this profound interest). 428 U.S. at 74, 75.

Second, the state's interest in preserving the fundamental rights of parents to raise their children is well established in constitutional law In *Meyers v. Nebraska*, 262 U.S. 390 (1923) the Court declared that the Fourteenth Amendment sheltered "not merely freedom from bodily restraint but also the right of the individual ... to marry, establish a home and *bring up children*...." *Id.* at 39 (emphasis added). In *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), a state law requiring that all children be sent to public school was declared by the Supreme Sourt to be unconstitutional because it "unreasonably interefere[d] with the liberty of parents and guardians *to direct the upbringing and education of children under their control*.... The child is not the mere creature of the state; *those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.*" *Id.* at 534, 535 (emphasis added). Even in *Roe v. Wade*, the Court emphasized that the same constitutionally protected right of privacy which sheltered the abortion decision of pregnant women also guaranteed to parents the right to raise their own children. 410

[8] The traditional basis for governmental protection of minors is the state's *parens patriae* power. *See* Clark, *The Law of Domestic Relations in the United States* §17.1 at 572 n.3 (1968); Custer, *The Origins of the Doctrine of Parens Patriae*, 27 Emory L.J. 195.

U.S. at 153, 153. Most recently, in *Parham v. J. L.*, _U.S._, 99 S. Ct. 2493 (1979) this Court unequivocally reaffirmed the importance of the state's interest in supporting parental authority in childrearing, even as against the substantial interests of adolescents in judicial due process and personal health autonomy. *See also,* Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights"*, 1976 B.Y.U.L.Rev. 60a5, 613, 616; Note, *Parent Child, and the Decision to Abort: A Critique of the Supreme Court's Statutory Proposal in Bellotti v. Baird*, 52 So.Cal.L.Rev. 1869, 1876-1888 (1979).

Third, the state's interest in supporting the family and protecting family privacy are equally profound. It is now well established that "freedom of personal choice in matters of ... family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment," *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639 (1974). Family relations have been described as being "as old and as fundamental as our entire civilization", *Griswold v. Connecticut*, 381 U.S. 479, 495-496 (1956) (Goldberg, J., concurring), the family as being "basic in the structure of our society", *Ginsberg v. New York*, 390 U.S. at 639, and family life as "something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted constitutional right". *Poe v. Ullman*, 367 U.S. 497, 551, 552 (1961) (Harlan, J., dissenting). As Justice Powell declared: "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this nation's history and tradition". *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (Powell, J., concurring). Chief Justice Burger summarized the matter well when he observed, only a year ago, that: "Our jurisprudence historically has reflected Western Civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course ..." *Parham v. J. L.*, 99 S. Ct. at 2493. *See also, Smith v. O.F.F.E.R.*, 431 U.S. 816, 862 (Steward, J., concurring); *Quilloin v. Walcott*, 434 U.S. 246 (1978).

Thus, there exist at least three extremely significant state interests served by the Utah parental notification law. Accordingly, the sole remaining question is whether or not there exists a sufficient nexus between those important interests and the requirement that parents be notified "if possible" before the performance of any abortion on their minor unmarried daughter.

IV. THE UTAH PARENTAL NOTIFICATION REQUIREMENT IS SUFFICIENTLY RELATED TO AND SUBSTANTIALLY FURTHERS SIGNIFICANT STATE INTERESTS.

A. *The Requirement Of Parental Notification "If Possible" Substantially Enhances The State's Profound Interest In The Well-Being Of Adolescent Girls.*

The rights of minors, of parents and of the State are not absolute. The interests of all three in assuming responsibility for the well-being of minors overlap and conflict, making some balancing an accomodation in the law necessary. The parental notification requirement is the best accomodation of these competing interests that is possible in the abortion context.

First, parental notification preserves a relationship that is essential to the well-being of adolescents. The word "adolescence" comes from the Latin word meaning "to grow to maturity." E. Hurlock, Adolescent Developoment 2 (4th ed. 1973). Adolescence is a time of transition from the dependency of childhood to the independence of adulthood. "Guidance is essential if the transition is to be made successfully and with minimum psychological damage". *Id.* at 15. Unlimited freedom adds to the adolescent's already-present feeling of insecurity. *Id.* at 256. J. Gallagher, F. Heald and D. Garrell, Medical Care of the Adolscent 243 (3rd ed. 1976). But the need for independence (identity) from parents is the primary drive during adolescence and this conflicts with the need for parental direction. I. Josselyn, Adolescence 40 (1971). Conflict between parent and adolescent is

natural, necessary and reaches its peak when the adolescent is between 15 and 17. E. Hurlock, *supra* at 297.

Because of this conflict, parental relations with their adolescent daughter are the most important relations she has during this time. D. Ausubel, R. Montemayor and R. Sujian, Theory and Problems of Adolescent Development 483 (2nd ed. 1977); J. Horrocks, The Psychology of Adolescence 42 (2nd ed. 1962).

> Parents often provide the psychological terrain upon which the adolescent struggles to find himself. They, in spite of the adolescent's periodic rejection of them, are typically *the most important people in any individual's life during the period of maturation*.... Because parents are so important they are the people with whom the adolescent has the most conflictual relationships.

I. Josselyn, *supra* at 35. Conflict between parents and their adolescent daughters "is unpleasant, but it is a necessity if the adolescent is to develop a healthy maturity". J. Gallagher, et al., *supra* at 243; *see also* Miller, *Adolescents and Authority* in Adolescence The Crisis of Adjustment 74 (Meyerson ed. 1975).

The premature breaking or weakening of the bond between parents and adolescent will be detrimental to the developmental well-being of the adolescent. "Court or agency intervention [including family planning agencies, both public and private—LDW] without regard to or over the objection of parents can only serve to undermine the familial bond which is vital to a child's sense of becoming and being an adult in his [or her] own right." Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy*, 86 Yale L.J. 645, 650 (1977). *See further* J. Goldstein, A. Freud and A. Solnit, Before The Best Interests of the Child 101-106 (1979). On the other hand, over-protection of the adolescent frustrates the necessary development of an independent identity. The requirement of parental notification of such a critical decision as the decision to have an abortion strikes the best possible balance between

premature abandonment of the adolescent, and over-restriction of the adolescent.

Second, parental participation is necessary because making a decision about abortion is extremely difficult for adolescents. It is difficult enough for adult women.[9] Adolescents have a *particular* need for adult guidance inareas in which they have no childhood experience to guide them. E. Hurlock, *supra* at 252. Ambivalence and confusion regarding the abortion decision are even greater for adolescents than they are for adult women.[10] Wallerstein, Kurtz, and Bar-Din, *Psychological Sequelae of Therapeutic Abortions in Young Unmarried Women*, 27 Arch.Gen. Psychiat. 828 (1972), reported that nearly 60% of the young women studied reported conflict regarding the abortion

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[9] Freeman, *Abortion: Subjective Attitudes and Feelings*, 10 Fam.Plng.Persp. 150, 152 (1978), reported:

"Most women [studied] experienced their abortions with some degree of conflicting emotions.... The largest proportion of the 106 followed-up respondents (24%) reported that the hardest part of the experience was with contending with feelings of loss of a child (although the participating clinics stressed 'fetus' and avoided the word 'child'). Other women (14%) found making the decision the hardest part of the experience. Also difficult (for 13%) was waiting for the abortion to be performed.... Another group (11%) described loneliness as the most difficult part of abortion. A fifth group (7%) struggled with self-acceptance."

This study further noted: "For many, the abortion decision contradicted their perceptions about themselves." *Id.* Moreover, "Sixty eight percent reported experiencing anxiety symptoms between pregnancy and abortion; 48% reported depressive symptoms. Four months after the abortion, 14% reported anxiety symptoms; 13% depressive symptoms." *Id.*. at 152, 153.

[10] Horowitz reports:

> The decision to have an abortion was not an easy one.... One of the young women admitted getting off of the table at the abortion clinic before the procedure began. Another was not told that she was having an abortion and was confused about what was occuring....
>
> Attitudes about the acceptability of abortion also demonstrate the ambivalence of many [adolescents] who had abortions. Looking back to the time before the abortion, less than one-half approved of abortion at that time.... Less than one-quarter approved of it after the abortion.

Horowitz, *Adolescent Mourning Reactions to Infant and Fetal Loss*, 59 Social Casework, 551, 557 (November 1978). *See further* Babikan and Goldman, *A Study in Teenage Pregnancy*, 128 Am.J.Psychiat. 755 (1971).

decision. For nearly 20% "a central emotional issue revolved primarily around *their deception of their families and the burden of secrecy*." *Id.* at 829 (Emphasis added.). They also reported that "an overwhelming number (specifically, 19 out of the 22) reported experiencing moderate to severe emotional distress during the period of the pregnancy." *Id.* The opportunity for parental guidance afforded by parental notification is substantially related to reducing these anxieties.[11]

Third, parental notification inviting parental participation in the decision process is extremely important because of the substantial risks associated with abortions for minors. Nearly one-third of all abortions (1.32 million total abortions in 1977, the last year reported) are performed on teenagers. *See* Teitze, *Teenage Pregnancies: Looking Ahead to 1984*, 10 Fam.Plng.Persp. 205 (1978); Forrest, Sullivan and Teitze, *Abortion in the United States, 1977-1978*, 11 Fam.Plng.Persp. 329 (1979). The physical health risks of abortions for minors are well-known to the Court.[12] The risk to the emotional and psychological well-being of the adolescent, however, may be even more profound. Studies of adolescents reveal that the risk of emotional problems are even more severe for them than they are for adult women.[13] One study reported that two-thirds of the

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[11] There is no little irony in Appellant's *amici* using the suicide argument in support of their assertion that parental notification ought not to be required, for isolation is the prime cause of suicide among adolescents, J. Gallagher, et at., *supra* at 244, and loneliness is one of the principal emotional problems encountered by women who obtain abortions. See footnote 9, *supra*.

[12] Abortion is associated with increased risk of complication in subsequent pregnancies. *See, e.g.*, Maine, *Does Abortion Affect Later Pregnancies?*, 11 Fam.Plng.Persp. 98 (1979); *Digest* 11 Fam.Plng.Persp. 39 (1979). In 1977, the last year for which statistics are currently available, 70% of all abortions were performed in non-*hospital* facilities. Forrest, et al., *supra* at 335. Case loads at abortion clinics are six to seven times higher than they are at hospitals. Forrest, Teitze and Sullivan, *Abortion in the United States, 1976-1977*, 10 Fam.Plng.Persp. 271, 276 (1978).

[13] Among women generally: "The ambivalence about pregnancy termination

(Footnote continued.)

adolescent pregnant patients "showed intense dependency needs". Babikian and Goldman, *A Study in Teenage Pregnancy*, 128 Am.J.Psychiat. 755, 759 (1971). Another study reported that nearly one-third of the *young* women who had abortions

> showed moderate to considerable decline in psychosocial functioning five to seven months postabortion as measured from the baseline of their reported adequate pre-pregnancy status. These young women, at initial follow-up, were suffering with a variety of specific symptoms of maladaptive behavior including *mild to moderate depressive episodes*, a variety of new physical complaints for which medical attention had not been sought,... difficulty in concentrating in school, *withdrawal* from previous social contacts, *lowered self-esteem* explicitly related to the pregnancy and abortion experience, *a newly begun promiscous pattern in relationships with men*, and regression to more infantile modes of relationships with parents. *These difficulties did not predate the pregnancy.*

Wallerstein, et al., *supra* at 830 (emphasis added). Adolescents with previous emotional difficulties "were found to be chronically distressed, in continued poor psychosociological health, and additionally burdened by the open, unassimilated pregnancy and abortion experience which they weemed unable to integrate." *Id.* at 831. The authors observed "that the young women in our study have only a 50% chance of having mastered the pregnancy and abortion experience to the point of adequate closure and reconstruction of the previous state of psychosocial

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(Footnote continued.)

continued after the procedure. Subsequent to their abortions, 65% of the women 'didn't know' if they would choose abortion again if unwanted pregnancy occurred. Only 22% believed they would do so; 13% stated they would have an unwanted child." Freeman, *supra* note 9 at 152. Four months after the abortion experience, 40% of the women studied "continued to be troubled or regarded their abortions as too upsetting to think about." *Id.* at 53. Seven percent of them said they regretted the abortion decision, and an additional six percent said that they would never have an abortion again. *Id.* Table 3.

functioning at five to seven months post-abortion." *Id.* They concluded:

> Our single most striking set of findings relates to the effects of the pregnancy and abortion experience upon *the younger adolescents in the 14-17 year age span.* Consequent symptom manifestations, even when only transient, tended to be *more dramatic and more severe* in this younger group.... Even more, we were struck by the more pervasive *long-range effects of the pregnancy and abortions experience upon these particular young women....* Overall it is clear that the pregnancy and abortion experience in the younger and less mature is *considerably heightened risk*, a point of potential major maturational skewing.

Id. at 832. *(emphasis added). See also* Perez-Reyes and Falk, *Follow-up After Therapeutic Abortion in Early Adolescence*, 28 Arch.Gen.Psychiat. 120, 124 (1973), and studies cited in Horowitz, *Adolescent Mourning Reactions to Infant and Fetal Loss*, 59 Social Casework 551, 553 n.10 (1978).

One of the particular difficulties for adolescents is the problem of dealing with the very real sense of loss after an abortion is performed. Horowitz, *supra.* A healthy adaptive mourning (successfully coping with the sense of loss) is tramatic enough.[14] However, non-adaptive or pathological mourning (failing to cope) is even more difficult.

> Typically, non-adaptive responses are exaggerations or the persistence of mourning reactions. Some of these reactions include the absence of mourning and continued inability to discuss the loss; persistent abnormal affective stages such as

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[14] Horowitz reports:

> The young woman's initial period of shock and denial of the loss is normally followed by reactions such as fantasising about the baby; expressing the need to see if it is possible to have another child; feeling guilty about her own role in the loss; feeling angry toward the hospital personnel, family, or the baby's father; and having somatic reactions. These responses are sometimes followed by a period of pain and despair, in which apathy is common. A teenager may show a lack of caring for herself and her future. This sometimes serves as punishment for her perceived role in the loss.

Horowitz, *supra* note 10 at 553.

> extreme and enduring anger, guilt, or depression; or new or exaggerated self destructive acting out.

Id. at 553. Less than one-fourth of the adolescents observed in the subject study completed the healthy adaptive mourning process. *Id.* at 155. "They tended to conceive again soon after the termination of the previous pregnancy. Many of the young women showed few mourning reactions, perhaps because of a fear of being overwhelmed by their responses and because few others supported their expression of these feelings." *Id.* at 558. The report concluded:

> Working through a loss is often a painful process, but failure to do so increases the likelihood that feelings about this loss will influence a young woman's feeling about herself, a subsequent child, and future separations and losses.... Working through a loss can be difficult, while become pregnant again may seem to be a simple solution. Young women need supportive help, help acknowledging and expressing their grief, if they are to take this more difficult route of dealing with their loss.

Id. at 559.

Adolescents who do not fully address this emotional problem face greater risk of subsequent pregnancy. "Conceiving again at a median of ... none and one-half months for the Abortion Group suggest that many may have had difficulty accepting the previous loss. Twenty five said that they purposely became pregnant again as a replacement of the previous loss. Thirteen did not admit planning the subsequent pregnancy, but avoided contraception even though they were aware of the consequences of doing so." *Id.* at 556. *See also id.* at 558, 559.

This may explain the phenomenon of the rising incidence of repeated abortions.[15] One study showed that 17% of the women under 18 who had abortions were pregnant again within one year.

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[15] In 1976 one-fourth of all abortions were repeat abortions. Teitze, *Repeat Abortions: Why More*, 10 Fam.Plng.Persp. 286 (1978). In 1977 the percentage was even higher. Forrest, et al., *supra* 10 Fam.Plng.Persp. at 334. The

(Footnote continued.)

Steinhoff, et al., *Women Who Obtain Repeat Abortions: A Study Based On Record Linkage*, 11 Fam.Plng.Persp. 30, 37 (1979). Another study showed that 41% of adolescents who had therapeutic abortions had resumed sexual intercourse six months later, more than two thirds of whom were then doing so without contraceptives. Perez-Reyes, et al., *supra* at 123. The implication of parental notification for this specific problem is explained by Horowitz:

> A major task of adolescence is the detachment from parental figures. *There are similarities between the course of this separation and the mourning process* [that follows abortion]. . . . 'Normal adolescent mourning,' as Max Sugar calls the process of separating from parental figures, *makes adolescents vulnerable to other losses. Some loss of support to the adolescent ego and superego have already resulted from this process. With further losses, the threat to an adolescent's identity can be strong.*

Horowitz, *supra* at 552. (emphasis added). Abortion without parental notification involves a severe double "loss" for the adolescent whose compensatory response very often appears to be to become pregnant again.

In all events, that minors need emotional support during and after the abortion experience is obvious. Id. at 558, 559; Spaulding and Cavenar, *Psychoses Following Therapeutic Abortion*, 135 Am.J.Psychiatry 364 (1978); Butler and Fujita, *Abortion Screening And Counselling: A Brief Guide For Physicians*, 50 Post Grad.Med. 208, 212 (1971). *Compare* Furstenberg and Crawford, *Family Support: Helping Teenage Mothers to Cope*, 10 Fam.Plng.Persp. 322, 333 (1978) (describing the similar relationship between parental support and adolescent success in adjusting to keeping a child). The ability of

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(Footnote continued.)

percentage of teenagers obtaining abortions who previously have experienced an abortion is estimated to be 0% for girls aged 14 and under, and rises by 5% with every age-year until 25% of the teenagers aged 19 having abortions have previously had one or more abortions. Teitze, *supra* 10 Fam.Plng.Persp. at 205.

the adolescent to weather the crisis is substantially improved when parents participate in the decision process. Perez-Reyes, et al., *supra* at 120, 124. Parental notification will reduce the liklihood of the isolation of the minor during the difficult decision process, and is necessary if meaningful parental support is to be available during the post-abortion period of emotional adjustment.

Fourth, parental notification is necessary to protect minors against their "peculiar vulnerability". Bellotti (II), 99 S. Ct. at 3043. Pregnant teenage girls are particularly vulnerable to the guiles of self-appointed social reformers and the influence of their peers.

The list of *amici curiae* who have filed briefs urging that the parental notification law be declared unconstitutional underscores the point that the critical question in this case concerns *who* will be given the primary opportunity to counsel with minors, and dramatically suggests the very real *consequences* that will result if this Court nullifies the Utah law. *Amici* supporting Appellant include: The Planned Parenthood Federation of America, Inc., which operates 744 family planning clinics (some of which offer abortions) in 43 states and the District of Columbia (Brief of Planned Parenthood Amici at 2); the American Association of Sex Educators, Counselors and Therapists; the National Association of Social Workers, Inc., a "substantial portion of [whose] 80,000 members are employed in child welfare, in school social work and in family service agencies" (*id.* at 5); the American Public Health Association, with membership of over 50,000 "professional health workers and consumers" (*id.* at 4); the National Abortion Federation, "composed of both professional individuals and groups providing abortion services" (*id.* at 6). The members of these organizations are engaged in the business of offering counsel regarding abortion to pregnant women, including teenagers. Not surprisingly, they agree that mandatory abortion counselling is constitutionally appropriate (indeed necessary). But they insist that parents *must*, as a matter of constitutional law, be denied

any favored position (mandatory notification) in the competition over *who* will provide that counsel to pregnant adolescents. (In fact, they artfully imply that since they are experts whose judgment would not be warped by emotional attachments, they ought to be preferred over amateur, emotionally involved parents. They fail to recognize that the parents will be dealing with their daughter for years to come, long after the "professionals" have disappeared from the scene.)

Such "friends of the court" are as self-serving as they are well-motivated. The authorities cited in their own briefs evidence that invalidation of the parental notification requirement will give *them* the principal opportunity to consult with pregnant teenagers *who are naturally reluctant to consult with their own parents about such matters. See* Planned Parenthood Amici Brief at 19, *See further, infra* at page 30.

Moreover, the influence of *peers* on the abortion decision of an adolescent can be substantial. *See generally* E. Hurlock, *supra* at 75-77; J. Gallagher, et al., *supra* at 243; I. Josselyn, *supra* at 42, 43; Brittain, *Adolescent Choices and Parent-Peer Cross-Pressures*, 28 Am.Soc.Rev. 385 (1963). Peers are not only the most *frequent* source of sex information to adolescents, D. Ausubel, et al., at 387, but they frequently are the source of *misinformation* about abortion. Hanson, *Abortion in Teenagers*, 21 Clin.Obst. and Gynec. 1175, 1180 (1978). Thus, parental notification would provide the adults most interested in the ultimate well-being of adolescents the opportunity to protect them against false, misleading, prejudicial or harmful "advise" from their "friends".

Fifth, parental notification will enable the doctor to exercise his best medical judgment. This Court has emphasized that the physician should consider "all factors—physical, emotional, psychological, familial and the woman's age—relevant to the well-being of the patient." *Doe v. Bolton*, 410 U.S. 179, 192 (1973); *Roe v. Wade*, 410 U.S. at 153. Adolescents generally will not be the best source of this relevant information. It is unlikely

that a 17 year old girl, much less a 14 year old, would have adequate memory of the details of her own medical history. The withholding of information regarding prior emotional and medical problems is another concern, expecially if the girl is afraid that by disclosing such information she might not be able to obtain the abortion she desires.

Thus, even though the medical profession routinely objects to legal regulation, physicians themselves strongly recommend that parents be involved when adolescents come to a doctor for an abortion. Hanson, *supra* at 1180, 1181; Butler and Fujita, *supra* at 212; American Academy of Pediatrics, *Pregnancy and Abortion Counselling*, 63 Pediatrics 920, 921 (1979); Perez-Reyes, *supra* at 126. *See further* J. Gallagher, *supra* at 52, 64. The benefits for the doctor and patient of parental participation in the abortion experience have been abundantly noted. *See* e.g., Butler and Fujita, *supra* at 212; Perez-Reyes, *supra* at 120, 124. With the majority of abortions now being performed in the unfamiliar surroundings of clinics and the like, where the mass-production techniques prevail, of which this Court is already familiar, *see Planned Parenthood*, 428 U.S. at 91, 92 n.2 (Stevens, J., concurring with Powell, J., joining), the requirement of parental notification, which invites parental medical input, substantially effectuates the state's interest in the well-being of minors.

Sixth, parental notification also provides a means of protecting minors against the brutalizing effects of participating in the killing of a human life. It is an established tradition in this country that minors do not have to serve in the armed forces. In fact, a minor can not voluntarily serve in the military without parental consent (or emancipation). 10 U.S.C. §1170 (1976). This may reflect a profound social sentiment that the young should not be exposed to the de-civilizing, anti-humanitarian effects of participating in the grisly work of killing. Parental notification may cushion the abortion experience for an adolescent and help to preserve the values of humanitarianism and respect for human life in future generations.

B. *The Requirement Of Parental Notification "If Possible" Substantially Advances The State's Significant Interest In Protecting Parental Rights.*

The Utah parental notification law strikes a perfect balance between the competing interests of the parent, the state and the child. It insures that the exercise of rights by one person will interfere in only a minimal way with the rights of others.

First, prior decisions have established that: (1) the right of parents to raise their own children has its source outside of government or positive law, *Smith v. O.F.F.E.R.*, 431 U.S. 816, 845 (1977); (2) the parent-child relationship is ordinarily outside the reach of the law, *Moore v. City of East Cleveland*, 431 U.S. 499, *Stanley v. Illinois*, 405 U.S. 645 (1972); (3) the right of parents to raise their children as they see fit is constitutionally protected, *Meyer v. Nebraska*, *supra*, *Pierce v. Society of Sisters*, *supra*, *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Parham v. J. L.*, *supra*; and (4) the government (including judicial officers of the government) can only interfere with parental control of their children in exceptional cases where it is necessary to protect the health or safety of the child or of society. *Prince v. Massachusetts*, *supra*, Wisconsin v. Yoder, *supra*. In *Ginsberg v. New York*, the Court noted:

> Constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. 'it is cardinal with us that the custody, card, and nurture reside first in the parents, whose primary function and freedom include preparation for obligations the State can neither supply or hinder.' ... *The legislature could properly conclude that parents* and others ... who have the primary responsibility for children's well-being *are entitled to the support of laws designed to aid discharge of that responsibility* ...

390 U.S. at 639, 640 (emphasis added). Like the New York law upheld in *Ginsberg*, the Utah parental notification law is a proper and significantly valid method of providing support to parents charged with the responsibility of raising children.

Second, without the legal requirement of parental notification many adolescents will not notify their parents. The argument that parental notification is futile because children from "good" families will automatically seek parental counsel about an unexpected pregnancy is absurd. Adolescents *typically* perceive that their relationships with their parents are poor. E. Hurlock, *supra* at 297; Adams, *An Introduction To Understanding Adolescents*, in J. Adams, Understanding Adolescents 6 (1968). Adolescents' confrontations with their parents are pervaded with fantasies. Miller, *supra* at 74. Discussion with parents regarding sex-related problems is especially difficult for teenagers. R. Sorensen, *Adolescent Sexuality In Contemporary America* 67-79 (1973). When peer-parental cross-pressures arise for adolescents, they typically attempt to resolve (avoid) the conflict by simply not communicating with their parents. Brittain, *supra* at 390, 391. One sutdy cited by Appellant's Amici reported that 45% of the teenagers receiving contraceptive information and services were doing so without parental knowledge. Torres, *supra* at 281. Thus, if adolescents can get abortions without parental notification, *many will.* As the doctors associated with one clinic reported:

> *Almost without exception*, younger women did not like to tell their parents. They fear parental reactions of shame or disappointment or a threatening posture. Oftentimes, the fact of intercourse, which the pregnancy exposes, causes the gravest concern for parents and should be fully discussed. Clinical experience has shown that *openness with parents* about the predicament, especially if initiated by the patient, has a better chance of eliciting the emotional support, something the patient may desperately need.

Butler and Fujita, *supra* at 212 (emphasis added). *See Baird v. Bellotti*, 450 F.Supp. 997, 1012 (D. Mass. 1978) (Jullian, J., dissenting) (adolescent fears of parental rejection seldom realized).

Third, the right of parents to inculcate in their children moral values is one of the critical features of the constitutionally protected right of child-rearing. The inculcation of moral values by the parents is clearly at stake when a minor daughter

contemplates having an abortion. *See Roe v. Wade*, 410 U.S. at 116; *Bellotti v. Baird* (II), 99 S. Ct. at 3047. Communication between parent and child is essential to the inculcation of parental morals in adolescents. Strang, *The Transistion From Childhood To Adolescence* in J. Adams, *supra* at 38. The *real* moral dilemma of a pregnant adolescent presents a crisis for which only the most naive would say prior parental moralizing would be sufficient preparation. *See* Note, *supra* 52 So.Cal.L.Rev. at 1900. Moreover, while the process of developing cognition and independent judgment may be nearly complete by late adolescence, development of moral judgment is more difficult and is not as clearly early-age-correlated. *See* W. Kay, Moral Development 179 (1968); Note, *State Intrusion Into Family Affairs: Justification And Limitations*, 26 Stan.L.Rev. 1383, 1395, 1396 (1974). Thus, parental notification is substantially related to preserving the rights of parents to raise their adolescent children.

C. *The Requirement of Parental Notification "If Possible" Substantially Advances the Significant State Interest In Preserving Families And Family Privacy.*

Parental notification is the least intrusive method of balancing the interests of the minor, her parents, and the state. It is the best method of preserving family privacy.

First, communication and shared experiences are the two principal factors affecting the relationships between an adolescent and her family. E Hurlock, *supra* at 299, 300. Parental notification, with one simple requirement, enhances both interests and contributes to family solidarity.

Second, the need for the law to bolster and support family institutions is widely recognized.[16] The American family, as an

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[16] Berger and Neuhaus report:

> We oppose policies that expose the child directly to state intervention, without the mediation of the family. We are skeptical about much current discussion of children's rights—especially when such rights are asserted

(Footnote continued.)

institution, is under severe strain. Yet despite the challenges of modernity, the strength of the family, as a natural support system for individuals in crisis, is profound. *See* Furstenberg and Crawford, *supra* at 333. The benefit to the family of parental notification can best be summarized in the words used by distinguished sociologist Amitai Etzioni to endorse the concept of *spousal* notification before an abortion:

> The principal sociological rationale for requiring consultation with the spouse is to encourage an airing of the feelings between the couple *before* any irreversible action is taken. Husband and wife may not necessarily end up with the same views, but alienation resulting from one person taking an unilateral and clandestine step will be avoided.
>
> Our main point is that the law does not merely regulate our lives, it articulates and symbolizes our values and mores. In an era when the family has been rendered increasingly vulnerable to dissolution, we should not gratuitously add to the stress by enshrining in law the starkly individualistic view that a child in the making, a future shared project of the family, is wholely and completely a 'private' matter for the woman to determine....

Etzioni, *The Husband's Rights in Abortion*, 12 Trial at 56, 58 (November 1976).

Third, one very strong but unspoken reason why this Court may have invalidated the spousal consent requirement is the historic judicial reluctance to supervise ongoing family relations. A parental *consent* requirement invites court involvement in domestic disputes. From this perspective, the argument that

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(Footnote continued.)

> against the family. Children do have rights, among which is the right to a functionally strong family....

P. Berger and R. Neuhaus, *To Empower People: The Role of Mediating Structures In Public Policy*, 20, 21 (1977). *See generally* Oliphant, *Abortion And The American Family: A Note On A Court Long Overdue*, ____ Human Life Rev. ____ (in press); B. Berger, The Family and Mediating Structures As Agents for Child Care in B. Berger and S. Callahan, eds., Child Care and Mediating Structures (1979).

there are less drastic alternatives to protect family and parental interests than a parental *consent* requirement makes good sense. However, the troubling dilemma of parental and family interests remains and it is difficult to brush those interests aside with a "let them eat cake" statement about the right of women to control their "own" bodies (*i.e.*, the bodies of their own unborn children). A mandatory parental *notification* requirement is the most practical solution. It provides meaningful protection for the interests of the family by giving the parents a voice, if not a vote, in the matter. By opening the channels of communication, and yet clearly giving the pregnant women the ultimate decision-making power, it operates to reduce the strain on family relations in an abortion situation. And it does this all without judicial intrusion upon family privacy!

V. THE UTAH PARENTAL NOTIFICATION LAW IS NOT UNCONSTITUTIONALLY OVERBROAD.

A. *The Utah Parental Notification Requirement Is Not Unconstitutional For Failing To Exclude Mature Minors From Its Coverage.*

The Utah statute is not overinclusive because it does not exclude mature minors. Many significant state interests (including assuring a complete basis for the medical decision, inviting parental support for the minor's decision, sustaining family unity, preserving parental right-to-know, etc.) are served by the parental notification requirement irrespective of the "maturity" of the minor involved. Moreover, the statute must be judged by reference to characteristics typical of adolescents generally. *See Califano v. Jobst*, 434 U.S. 47 (1977).

The argument that the Utah parental notification requirement is unconstitutional because it fails to provide an exception for the "mature minor" begs the issue. Whatever merit there may be to the argument that a state requirement of parental *consent* is unconstitutional if it fails to contain an exception for mature minors does not exist when the state law merely requires parental *notification*. The decisions of this Court in both *Planned*

Parenthood, supra; and *Bellotti v. Baird* (II), *supra*, were predicated on the fact that the requirement of consent gave parents an *absolute veto* over the decision of their "mature" minor daughters. Parental notification is a *minimal* intrusion, the least possible intrusion short of giving "mature minors" an *absolute* right to secret abortions.

Futhermore, the requirement of a "mature minor" exception would violate the principle of family privacy. Without minimal procedural protections of notice and an opportunity to be heard, parents would be deprived of a fundamental right without due process. *Caban v. Mohammed*, ___ U.S. ___, 99 S. Ct. 1960 (1979) *See also Fuentes v. Shevin*, 407 U.S. 67 (1972). And if the protections were provided, family privacy would be sacrificed, as the judicial "umpire" intruded into the most private family council.

The ascertaining of "maturity" of a minor, like finding her "best interests," is objectively indeterminate. *Bellotti v. Baird* (II), 99 S. Ct. at 3048, n.23 (Powell, J., concurring, with three others joining); *see also id.* at 3054 (Stevens, J., concurring with three others joining). *See* Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminancy*, 39 L. & Contemp. Prob. 226, 257-261 (Summer 1975). The totality of factual information necessary to make such a decision is unavailable to a stranger-decision maker (*especially* if the parents are not permitted to participate in the proceeding). *See* Note, *supra* 52 So.Cal.L.Rev. at 1895-1897. Moreover, the standard of "maturity" is objectively indeterminate; there are simply scores of competing theories about maturation and development. *See e.g.*, Beller, *Theories Of Adolescent Development*, in J. Adams, Understanding Adolescence 70 (1968); B. Berger, *supra* note 16 at 4-6. Thus, the judge would be required to make the determination based upon his own subjective values and intuition. That is, the judge would be exercising the same *absolute unguided discretion* which the Court would be trying to prevent parents from exercising! *See also*, Goldstein, *supra* at 650, 664; Note, *supra* 24 Stan.L.Rev. at

1387; J. Goldstein, A Freud and A. Solnit, Beyond the Best Interests of the Child, 49-52 (1973).

B. *The Utah Parental Notification Law Is Not Unconstitutional Because It Fails To Exclude Children Of Abusive Parents.*

The simple response to the argument that the Utah parental notification law does not protect children of abusive parents is that other provisions of the Utah Code Ann. do so. *See e.g.*, Utah Code Ann. § 78-3a-29, § 78-3a-48, 78-3a-50, and 78-3b-6 (1953). The Utah parental notification requirement must be read together with these provisions.

Reference to these child protection provisions underscores the critical importance of balancing the interests at stake. For example, even though a child may be severely beaten and life-threatened, the State does not, and constitutionally can not, terminate parental rights without a modicum of due process (including at a minimum notice and an opportunity to be heard). *Stanley v. Illinois, supra.* Similarly, even though the beating and even killing of women who file for divorce by their husbands occasionally (but too often) happens, the law does not allow secret divorces. Instead, the law uses all devices at its disposal to protect the threatened woman (injunctions, orders for separate maintenance, contempt powers, etc.). The interests of children of abusive parents are of concern to Utah policy makers. But if we have a government of laws, and not just men, those interests must be protected within the parameters of fundamental fairness to the parents as well.

CONCLUSION.

Dissenting in *Roe v. Wade*, Mr. Justice Rehnquist warned that the application of substantive due process standards in the abortion context would embroil the Court in the inappropriate and improper task of examining legislative policies and passing on the wisdom of those policies in the very process of deciding whether challenged state abortion legislation could be upheld. 410 U.S. at 174. The cases dealing with the issues of parental consent and consultation are prime evidence of the accuracy of this prediction and of the perils of substantive due process. Applied in the context of the conflicting family interests involved, with which states are particularly concerned and competent and with which federal judges are notably unfamiliar, *Sosna v. Iowa*, 419 U.S. 393, 404 (1975), the abortion doctrine reaches the boundaries of its conceptual limits and encounters competing relationships which have not only received similar substantive due process protection, but which have a basis in history, culture and law which greatly antedates the judicially created abortion doctrine.

Certainly the Court had this in mind in *Roe v. Wade* when it specifically declined to include family law in its comprehensive model of abortion regulation. 410 U.S. at 165 n.67. Since that decision, however, *more than 30* federal court decisions have been rendered dealing with the subject of parental consent or consultation.[17] The last seven decisions, all rendered after *Bellotti v. Baird* (II), have *unanimously* disapproved of parental participation in various schemes and approaches.[18] Regrettably, *all* of these opinions are short on credible analysis and are characterized by the clap-trap application of misperceived abortion dogma. While the Opinions of this Court on the subject have drawn some very fine and subtle distinctions, it is apparent that the lower courts are much more impressed by what they think the Court is doing (applying *absolute pro*-abortion jural

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[17] These cases are listed in the Appendix attached hereto.

[18] *See* note 17, *supra*.

postulates) than by what the Court is saying (about *balancing* interests and *non*-absolutism).

The Utah parental notification statute marks the finest balance of competing interests that is possible in the context of a minor seeking an abortion. With *very* little inconvenience to minors' rights, it affords *a great deal* of protection to the rights and interests of others. The Court can do much to dispell erroneous and false notions about abortion absolutism by upholding the Utah statute. It should do so.

Respectfully submitted,

Lynn D. Wardle
Attorney for Amicus
Utah Association of Women

Robert W. Barker
Attorney for Amicus
United Families Foundation

Stephen A. Hildebrandt
Of counsel

Dated May 19, 1980.

CERTIFICATE OF SERVICE

State of Utah)
) ss
County of Utah)

I, Lynn D. Wardle, one of the attorneys for Amici Curiae, being a member of the Bar of the Supreme Court of the United States, do hereby certify that all parties required to be served have been served and that I have caused three copies of the foregoing brief to be served upon counsel of record for the Appellant and the Appellees in this case in accordance with Rule 33 of the Rules of Supreme Court of the United States by depositing the same this day in a United States Postal Service mailbox, with firstclass postage prepaid, addressed to the following:

David S. Dolowitz, Esq., Parson, Behle & Latimer, 79 S. State St., P.O. Box 11898, Salt Lake City, Utah 84147, Attorney for Appellant.

Paul M. Tinker, Esq., Assistant Attorney General, 236 State Capitol Bldg., Salt Lake City, Utah 84114, Attorney for Appellees

All done this 19th day of May, 1980.

Lynn D. Wardle

APPENDIX

THIRTY FOUR (34) FEDERAL COURT OPINIONS RENDERED SINCE *ROE V. WADE*, 410 U.S. 113 (1973) CONCERNING PARENTAL PARTICIPATION IN THE ABORTION DECISION OF A MINOR DAUGHTER.

A. Twelve (12) Decisions Rendered After *Roe*, But Before The Supreme Court Decisions in *Danforth* And *Bellotti* (I).

1. Coe v. Gerstein, 376 F.Supp. 695 (S.D. Fla. 1973) (parental consent requirement unconstitutional), *appeal dismissed*, 417 U.S. 279 (1974), *aff'd sub nom.* Poe v. Gerstein, 517 F.2d 787 (5th Cir. 1975), *aff'd mem.* 428 U.S. 901 (1976).

2. Poe v. Gerstein, 517 F.2d 787 (5th Cir. 1975), *aff'd mem.* (parental consent requirement unconstitutional), 428 U.S. 901 (1976).

3. Baird v. Bellotti, 393, F.Supp. 847 (D. Mass. 1975) (parental consent statute unconstitutional), *vacated*, 428 U.S. 132 (1976), *on remand*, 428 F.Supp. 854 (D. Mass. 1977) and 450 F.Supp. 997 (D. Mass. 1978), *aff'd*, 99 S. Ct. 3035 (1979), *reh den.* 100 S. Ct. 185 (1979).

4. Planned Parenthood Association v. Fitzpatrick, 401 F.Supp. 554 (E.D. Pa. 1975) (parental consent requirement unconstitutional), *aff'd mem in part and vacated and remanded in part*, 428 U.S. 901 (1976).

5. Foe v. Vanderhoof, 389 F.Supp. 947 (D. Colo. 1975) (parental consent requirement unconstitutional).

6. Doe v. Exon, 416 F.Supp. 716 (D. Neb. 1975) (parental consent statute enjoined).

7. Doe v. Rampton, 366 F.Supp. 189 (D. Utah 1973) (parental consent statute unconstitutional), *vacated*, 410 U.S. 950 (1973).

8. Wolfe v. Schroering, 388 F.Supp. 631 (W.D. Ky. 1974) (parental consent requirement unconstitutional), *modified*, 541 F.2d 523 (6th Cir. 1976).

9. Doe v. Zimmerman, 405 F.Supp. 534 (N.D. Pa. 1975) (parental consent requirement unconstitutional).

10. Planned Parenthood v. Danforth, 392 F.Supp. 1362 (E.D. Mo. 1975) (upholding parental consent requirement), *modified*, 428 U.S. 52 (1976).

11. Wulff v. State Board of Registration for Healing Arts, 380 F.Supp. 1137 (E.D. Mo. 1974) (upholding common law parental consent requirement), rev'd, 508 F.2d 1211 (8th Cir. 1974), *modified*, 428 U.S. 106 (1976).

12. Roe v. Rampton, 394 F.Supp. 677 (D. Utah 1975) (abstaining and upholding parental notification requirement), *aff'd*, 535 F.2d 1219 (10th Cir. 1976).

B. The Two Supreme Court Decisions Of 1976.

1. Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (parental consent requirement unconstitutional).

2. Bellotti v. Baird (I), 428 U.S. 132 (1976) (abstaining regarding parental or judicial consent requirement).

C. Twelve Cases Decided Between *Bellotti* (I) and *Bellotti* (II).

1. Doe v. Deschamps, 461 F.Supp. 682 (D. Mont. 1976) (declining to invalidate parental notification requirement).

2. Gary-Northwest Indiana Women's Services v. Bowen, 421 F.Supp. 734 (N.D. Ind. 1976) (parental consent statute unconstitutional), *aff'd mem.* 429 U.S. 1067 (1977).

3. Hoe v. Brown, 446 F.Supp. 329 (N.D. Okla. 1976) (parental consent requirement unconstitutional).

4. Abortion Coalition v. Michigan Department of Public Health, 426 F.Supp. 471 (E.D. Mich. 1977) (parental consent requirement unconstitutional).

5. Wynn v. Scott (II), 449 F.Supp. 1302 (N.D. Ill. 1978) (parental consent requirement unconstitutional), *appeal dismissed*, 99 S. Ct. 49 (1978), *aff'd sub nom.* Wynn v. Carey, 599 F.2d 193 (7th Cir. 1979).

6. Wolfe v. Schroering, 541 F.2d 523 (6th Cir. 1976) (parental consent provision unconstitutional).

7. Lady Jane v. Maher, 420 F.Supp. 318 (D. Conn. 1976) (enjoining enforcement of guardian consent statute), *aff'd*, 431 U.S. 926 (1976).

8. Floyd v. Anders, 440 F.Supp. 535 (D.S.C. 1977) (parental consent statute unconstitutional), *vacated*, 99 S. Ct. 1200 (1979).

9. Wynn v. Scott (1), 448 F.Supp. 997 (N.D. Ill. 1978) (parental consent requirement unconstitutional), *aff'd sub nom.* Wynn v. Carey, 582 F.2d 1375 (7th Cir. 1978).

10. Wynn v. Carey (2), 599 F.2d 193 (7th Cir. 1979) (parental consent statute unconstitutional).

11. Baird v. Bellotti (3), 450 F.Supp. 997 (D. Mass. 1978) (permanently enjoining parental or judicial consent statute), *aff'd*, 99 S. Ct. 3035 (1979), *reh den.* 100 S. Ct. 185 (1979).

12. Women's Services, P.C. v. Thorne, Civil No. 79-L-85 (D. Neb. April 20, 1979) (parental notification statute unconstitutional).

D. The Supreme Court Parental or Judicial Consent Decision Of 1979.

1. Bellotti v. Baird (II), 99 S. Ct. 3035 (1979) (requirement of parental or judicial consent unconstitutional), *reh den.* 100 S. Ct. 185 (1979).

E. Seven (7) Opinions Rendered Since *Bellotti (II)*.

1. Leigh v. Olson, Civ. No. A3-79-78 (D.N.D. July 9, 1979) (parental notification requirement unconstitutional).

2. Jones v. Smith, No. 79-6403-civ.-SMA (S.D. Fla. July 13, 1979) (parental consent requirement unconstitutional).

3. Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F.Supp. 1172 (N.D. Ohio August 22, 1979) (parental consent and notice requirements unconstitutional).

4. Women's Community Health Center, Inc. v. Cohen, 477 F.Supp. 542 (D. Me. 1979) (parental notification provision unconstitutional).

5. Women's Services, P.C. v. Thorne, cv 79-L-85 (D. Neb. October __, 1979) (permanently enjoining parental notification statute).

6. Charles v. Carey, No. 79-C-4541 (N.D. Ill. November 16, 1979) (parental notification requirement unconstitutional).

7. Margaret S. v. Edwards, No. 78-2765 (E.D. La. March 3, 1980) (parental notification requirement and separate parental consent requirement unconstitutional).

For further discussion of these cases and the overall federal court treatment of parental consent and parental notification requirements *see* L. Wardle, The Abortion Privacy Doctrine: A Compendium And Critique Of Federal Court Abortion Cases (Wm. S. Hein & Co.: in press).

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In the Supreme Court of the United States

OCTOBER TERM, 1980

H—— L ——, etc.,

Appellant,

vs.

SCOTT M. MATHESON, et al.,

Appellees.

On Appeal From The Supreme Court Of The State Of Utah

BRIEF AMICUS CURIAE OF AMERICANS UNITED FOR LIFE IN SUPPORT OF APPELLEES, SCOTT M. MATHESON, et al.

DENNIS J. HORAN
VICTOR G. ROSENBLUM
JOHN D. GORBY
PATRICK A. TRUEMAN
DOLORES V. HORAN
THOMAS J. MARZEN
230 N. Michigan — Suite 915
Chicago, IL 60601
312-263-5029
Attorneys for Americans United for Life

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-5903

H—— L ——, etc.,

Appellant,

vs.

SCOTT M. MATHESON, et al.,

Appellees.

On Appeal From The Supreme Court Of The State Of Utah

BRIEF AMICUS CURIAE OF AMERICANS UNITED FOR LIFE IN SUPPORT OF APPELLEES, SCOTT M. MATHESON, et al.

INTEREST OF THE AMICUS

Americans United for Life (AUL) is a national educational foundation organized to promote better understanding of the humanity and value of unborn human life, and to assure equal protection under law for all members of the human family regardless of age, health, or condition of

dependency. The national office of Americans United for Life is located in Chicago, Illinois. AUL is supported by thousands of Americans from every State of the union.

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Divinity - Church History
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PROF. WILL HERBERG
Philosophy and Culture
Drew University
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PROF. DAVID W. LOUISELL
Law
University of California
1975 - 1977

This brief is filed in support of Appellees Scott M. Matheson *et al.* Letters of consent for the filing of this Brief have been sent to this Court by both the Appellants and the Appellees.

SUMMARY OF THE ARGUMENT

The Utah parental notice law now before this Court differs substantially from the Massachusetts and Missouri parental consent laws at issue in *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976), *Bellotti* v. *Baird (I)*, 428 U.S. 132 (1976), and *Bellotti* v. *Baird (II)*, 443 U.S. 622 (1979): it merely provides notice to parents that their minor daughter is seeking an abortion.

This notification does not violate any privacy right against public disclosure, since the minor's parents are not members of the general public, but rather guardians with responsibility for her care and nurture.

Unlike the statutes previously before this Court, the Utah law requires no consent to the procedure by the parents. Thus, even if in a rare instance a parent, once notified, should obstruct or burden the effectuation of the minor's provisonal abortion decision, such private parental acts would not constitute state action since parents are not agents of the State for the purpose of rearing and raising children. *Meyer* v. *Nebraska*, 262 U.S. 390 (1923). Nor could such acts be imputed to the State under the "state action" decisions of this Court. *See, e.g., Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972). Providing a parent with notice of a child's provisional decision to have an abortion is principally designed to permit parents to exercise their fundamental rights and responsibilities as parents to support and guide their child who is facing a difficult decision, rather than to carry out the acts or the policies of the State. Any nexus that may exist between the notice required by the State of Utah and a hypothetical instance of subsequent burdensome parental conduct is too remote to warrant a finding that such parental conduct can properly be imputed to the State.

Utah has significant state interests in protecting the fundamental rights of parents in their child-rearing role and in enhancing the integrity of the minor's decision whether to carry her pregnancy to term or to terminate it. Even if the Utah law imposed a burden on a right of the minor, it would be constitutional because the State's interests are significant and the Utah law rationally serves those interests. *Planned Parenthood* v. *Danforth,* 428 U.S. at 75.

The intended purpose and primary effect of the Utah law are to enhance parent-child communication and consultation about a decision of fundamental import in the child's life. In the words of Mr. Justice Stevens, "It is unrealistic . . . to assume that every parent-child relationship is either (a) so perfect that communication and accord will take place routinely or (b) so imperfect that the absence of communication reflects the child's correct prediction that the parent will [act] arbitrarily to further a selfish interest rather than the child's interest." *Planned Parenthood* v. *Danforth,* 428 U.S. at 103-104 (Stevens, J., concurring in part and dissenting in part). The parental notification statute advances the long-range best interests of the minor child by protecting her from the consequences of her own fears and reluctance to involve her parents.

ARGUMENT

I.

THE UTAH PARENTAL NOTIFICATION STATUTE DOES NOT CONSTITUTE STATE ACTION IMPINGING ON ANY PRIVACY RIGHT OF THE MINOR

In *Whalen* v. *Roe,* 429 U.S. 589, 699-600 (1977), this Court identified "two different kinds of interests" as being protected by the constitutional right of privacy: "the individual interest in avoiding disclosure of personal matters" and "the individual interest in independence in making certain kinds of important decisions." Because these two interests are distinct, they must be analyzed separately. Principles applicable to one interest are not necessarily applicable to the other.

The Utah statute does not impinge on constitutionally protected aspects of either interest.

A. The Statute Does Not Impinge On Any Possible Privacy Right of the Minor to Prevent Public Disclosure of Her Proposed Abortion

The minor possesses a general right not to have her "private affairs made public by the government." Kurland, *The private I,* The University of Chicago Magazine 7, 8 (Autumn 1976), quoted with approval in *Whalen* v. *Roe,* 429 U.S. at 599 n.24. But it does not follow that a minor may properly assert such an interest in nondisclosure as against her parents. Nor does it follow that a law which provides only that parents be notified of their daughter's provisional abortion decision constitutes a

"public disclosure" against which the minor's right to privacy may properly be invoked.

The Utah law does not vest parents with the "veto power" over the minor's abortion which the State itself does not possess, as would a parental consent statute. *Compare Planned Parenthood* v. *Danforth,* 428 U.S. at 74. Rather, it provides the parents only with knowledge of the contemplated abortion. This Court has held that the States do possess the power to require that abortions be reported to appropriate state agencies. *Id.* at 79-81 (upholding a statute which required the names of women who procure abortion and relevant medical data to be reported to the State). *See also Bellotti* v. *Baird (II),* 443 U.S. at 643-644 (plurality opinion), (warranting a statutory scheme by which parents or, in the alternative, a judicial agent of the State receive notice); *Whalen* v. *Roe,* 429 U.S. 589 (1977), (upholding a law requiring that the State be notified of all recipients of certain drugs). Therefore, the State itself possesses the authority which it guarantees to parents under the Utah law.

Like the reporting schemes upheld in *Danforth, Bellotti,* and *Whalen,* the Utah law does not result in broad public disclosure of the conduct in question. There is certainly no greater risk of unwarranted dissemination of information on the minor's abortion under the Utah law than in schemes which provide that a drug recipient's name must be included in a computer file (as in *Whalen*), or that the identity of women who have procured abortion must be reported to a state agency (as in *Danforth*), or that the minor who wishes to abort may be the subject of a judicial proceeding (as in *Bellotti II*).

None of these cases has held that the limited disclosure at issue amounted to an "undue burden" on the right to privacy. *A fortiori,* it would be particularly inappropri-

ate to hold that a minor might properly assert such an interest in non-disclosure against her parents.

Parents have a fundamental responsibility to nurture and guide their minor children, but can do so effectively only if they are aware of their children's problems and behavior. Neither our tradition of law nor any principle implicit in our concept of ordered liberty implies that the minor may properly assert a right to a "secret abortion" as against her parents. "Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children." *Parham* v. *J.R.*, 442 U.S. 584, 602 (1979). Indeed, in *Meyer* v. *Nebraska,* 262 U.S. 390 (1923), and *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925), the Court held that in some circumstances the Constitution compels a State to respect the traditional authority of the parent.

Since "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents," *Prince* v. *Massachusetts,* 321 U.S. 158, 166 (1944), it would be a major error to conceive the minor's non-disclosure privacy interest in a manner which foreclosed parental knowledge of a minor's important decisions. Only participants within the child's zone of familial privacy—not members of the public at large—are informed of the child's provisional decision to abort under the Utah law. Parental knowledge of this important conduct contemplated by their child does not make them interlopers in the minor's protected zone of informational privacy. Because the Constitution places the parents squarely *within* the boundaries of the minor's sphere of privacy, parents are not such strangers to their minor daughters that a constitutionally protected interest in informational non-disclosure may be properly asserted against them by their child.

B. The Utah Statute Does Not Impinge on the Minor's Privacy Right To Decide To Have An Abortion And To Effectuate That Decision

The Utah law provides no veto power to parents or to any third party over a minor's abortion decision. Under the Utah law, a minor may make and effect an abortion decision in "defiance of the contrary opinion of the sovereign or other third parties." *Bellotti* v. *Baird (II)*, 443 U.S. at 655 (Stevens, J., concurring in the judgment).

Since the law now before this Court grants neither to parents nor to any agency of the State any power to obstruct effectuation of a minor's abortion decision, it differs fundamentally from the Missouri law struck down in *Planned Parenthood* v. *Danforth* which imposed an "absolute limitation on the minor's right to obtain an abortion" by providing one of her parents with the right to veto a proposed abortion. 428 U.S. at 90 (Stewart, J., concurring). Similarly, it differs from the Massachusetts law, struck down in *Bellotti* v. *Baird (II)*, which required that the minor obtain the consent of both of her parents prior to an abortion or, if one or both of her parents refused consent, that the minor obtain the consent of the State. 443 U.S. at 630.

Accordingly, any claim that the Utah statute facially burdens the right of the minor to decide whether or not to abort would have to be based on a theory that the child's awareness that her parents will be informed will in some manner influence her not to procure an abortion, or to procure an abortion under undesirable circumstances. But all sorts of governmental action may "influence" constitutionally protected decision-making without rendering that action unconstitutional.

For example, one may have a First Amendment right to form and to hold an adverse opinion about racial minorities. Although the State's legitimate interest in promoting integration of the races would not be sufficiently compelling to punish expression of such an opinion, this does not mean that it is unconstitutional for the government to wage a television advertising campaign to influence the public to accept all races as equal. This is so despite the fact that such governmental activity is *designed* to induce one to abandon one's constitutionally protected beliefs concerning racial minorities.

Similarly, the State may develop programs which seek to create a better environment for carrying children to term as, for example, by improving prenatal care and by satisfying more fully the subsistence needs of the poor. The existence of such programs might well "influence" someone undecided about whether to have an abortion. If any such influence were held to impinge on the fundamental privacy right to decide whether or not to carry to term, the result would be absurd.

With this statute, the Utah legislature sought to enhance a minor's decision-making and to strengthen the family unit by providing for parental consultation concerning a critically important decision in their daughter's life. As Mr. Justice Stevens pointed out,

> An assumption that the parental reaction will be hostile, disparaging, or violent no doubt persuades many children simply to bypass parental counsel which would in fact be loving, supportive, and, indeed, for some indispensable.

Planned Parenthood v. *Danforth,* 428 U.S. at 103 (Stevens, J., concurring in part and dissenting in part).

Merely because the Utah law may "influence" some minors' decisions whether or not to abort does not mean that it impinges on their constitutionally protected privacy interest.

C. Parental Responses To Notification Which May Obstruct Effectuation of the Minor's Abortion Decision Cannot Be Imputed to the State

On its face, the Utah law does not impinge on the minor's privacy right, as the preceding sections have shown. It may be argued, however, that the Utah law unconstitutionally burdens the minor's right because of the prospect that *some* parents who are notified in accordance with the Utah law *may* obstruct their daughter's access to an abortion. But the Fourteenth Amendment, from whose provisions the privacy right encompassing the decision whether to terminate pregnancy is drawn (*Roe* v. *Wade,* 410 U.S. 113, 153 [1973]), operates only against the *State.* In order for the statute to be stricken on the basis of potential parental obstruction two things must be shown. First, it must be demonstrated that such parental conduct would, by virtue of the notification law, become state action. Second, it must also be shown that such conduct should be imputed, not merely to the State, but to the notification statute itself. Only if both propositions are accurate can the statute be stricken.*

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* It would be insufficient merely to demonstrate that the statute converts parental conduct into state action, even if this could be done. A police officer carrying out duties authorized by statute may, in the course of them, commit unjustifiable homicide. For the purposes of an action against the municipality for wrongful death, this might be state action. But this would not mean that the prospect of such abuses of police authority would be properly attributed to the statute authorizing a police force, requiring that the *statute* be held unconstitutional.

First, the Utah statute grants to parents, and to parents alone, the right to be informed that an abortion is to be performed on their minor daughter. It must be presumed that parents will act in the best interests of their children. *Parham* v. *J.R.*, 442 U.S. 584, 602 (1979). But even if parents notified of their daughter's intended abortion actually attempted to obstruct the abortion, such parental conduct would not constitute the state action precluded by the Fourteenth Amendment. If parents in the State of Utah have any legal authority to control the conduct and behavior of their children, it does not arise from this statute. Insofar as parents exercise supervision over their children, they are not thereby acting as agents of the State.*

Nor does the existence of the notification statute transform such private parental conduct into state action. The causal nexus or points of contact between the private conduct of the parents and the State created by the Utah law are simply insufficient to warrant the conclusion that a parental response which prevents the minor from procur-

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* An interpretation of the Constitution which dealt with parental supervision of their minor children as though it were based on authority "delegated" by the State would not only violate long established tradition, but also run counter to recent findings in modern psychiatry and psychology. The recent publication by Joseph Goldstein, Anna Freud, and Albert J. Solnit of *Before the Best Interests of the Child* (1979) culminates and summarizes the contemporary discovery of "complex and vital developments" in the psychological growth of the child through adolescence which "require the privacy of family life under guardianship by parents who are autonomous. . . . The child's need for safety within the confines of the family must be met . . . through . . . recognition of family privacy as the barrier to state intrusion upon parental autonomy in child rearing." *Id.* at 9. *See also The Psychological Aspects of Abortion* (D. Mall & W. Watts, ed. 1979).

ing abortion "may be fairly treated as that of the State itself." *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974).*

In *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972), this Court held that the racially discriminatory practices of a private club were not performed under color of state law merely because the State of Pennsylvania provided the club with a liquor license, even though the club would not have been able to conduct its discriminatory activity had the State not made the license available.

Any relationship here between the State and possible private parental conduct that obstructs abortion is significantly less intimate than the relationship between the State and the racial discrimination in private clubs considered in *Moose Lodge*. Under the Pennsylvania liquor licensing scheme there at issue, consent of the State through issuance of a liquor license was a necessary condition precedent to service of any liquor under any circumstances. To the extent that Pennsylvania licensed establishments to serve liquor, while knowingly permitting it to be served on a discriminatory basis, the State at least passively countenanced discriminatory conduct. Moreover, Pennsylvania's intrusion into the private market place through its complex and extensive system of alcohol regulation and "state store" system of carry-out liquor sales appeared to vest private liquor distribution practices with the

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* The statute before this Court hardly delegates to the parents any new power "traditionally exclusively reserved to the State." *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. at 352. Indeed, the common law typically provides for parental consent prior to medical treatment; it certainly does not acknowledge any right in the minor which may be asserted against parents' knowledge of the minor's conduct. *See* this Brief at 22-23n.

State's seal of approval.* But unlike the licensing scheme of *Moose Lodge,* under which Pennsylvania explicitly granted private clubs the authority to serve liquor—something they would lack in the absence of a license—a law which simply provides for parental notice prior to abortion in itself vests parents with no legal authority to supervise their daughter in a fashion which obstructs effectuation of their daughter's reproductive choices.

The Utah law is a state effort to support parents in exercising their already extant fundamental private right to nurture and guide their minor children. *Pierce* v. *Society of Sisters,* 268 U.S. 510, 535 (1925). *See also, Wisconsin* v. *Yoder,* 406 U.S. 205, 214 (1972); *Prince* v. *Massachusetts,* 321 U.S. 158, 166 (1944); *Meyer* v. *Nebraska,* 262 U.S. 390, 400 (1923). In this regard, the Utah law assists parents to exercise their basic responsibility to care for, nurture, and guide the moral development of their minor daughter. In contrast, the one Pennsylvania regulation struck down by *Moose Lodge* required private individuals to continue to adhere to racially discriminatory by-laws if their lodge

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* The rule which permits licensing of private clubs without regard to discriminatory practices might well lead to total or near total denial of access to service to members of one race, or to the segregation of all services, through the transformation of public establishments into private clubs. Yet the extent to which private clubs—whether a large majority or only a small minority—discriminate in practice makes no difference in whether or not state licensing constitutes state action. Similarly, the extent to which parents, in response to notification about their daughter's provisional abortion decision, may act to obstruct effectuation of such decisions is not relevant to the determination of whether any such parental conduct may properly be construed as state action by virtue of a parental notice law. As it happens, Plaintiffs and their Amici concede that many parents will not obstruct. *See, e.g.,* Brief of Medical Coalition for the Medical Rights of Women *et al.,* at 19.

was to continue to be licensed. Statutes which tend to implement the exercise of constitutionally recognized values, such as the right of parents to nurture and guide their minor daughters, warrant far greater deference than laws which permit conduct devoid of constitutional value, such as a racially discriminatory practice. As this Court has stated, distinguishing limited state aid to religious schools from analogous aid to private schools established to maintain racial segregation,

> [A]lthough the Constitution does not proscribe private bias, it places no value on discrimination as it does on the values inherent in the Free Exercise Clause. Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections. . . . However narrow may be the channel of permissible state aid to sectarian schools . . . it permits a greater degree of state assistance than may be given to private schools which engage in discriminatory practices that would be unlawful in a public school system.

Norwood v. *Harrison*, 413 U.S. 455, 469-70 (1973).

The Constitution places "no value on discrimination" such as that practiced at the private club of *Moose Lodge*, while the right of parents to nurture and guide their minor children has been granted "affirmative constitutional protection." Therefore, the Constitution permits a greater degree of "state assistance" to parents in the exercise of their constitutionally recognized function of guiding their children than the State could provide to a private club which practiced racial discrimination.

At the very least, therefore, the nature of the right arguably affected by the Utah law here does not warrant application of a more *exacting* doctrine of "state action"

than was applied in *Moose Lodge*. The facts and circumstances of *Moose Lodge* concerned alleged state involvement in racial discrimination, the fault which the Post-Civil War Amendments were explicitly intended to remedy. On the other hand, the rights of parents were among those which the Post-Civil War Amendments were intended to assure.* The obligation of this Court to guard

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* The abolitionists considered one of the most repulsive features of the institution of slavery to be the power of private parties to cause the slave's "authority and responsibility to rear his children [to be] obliterated. The members of his family might be torn from him and scattered." J. tenBroek, *The Antislavery Origins of the Fourteenth Amendment* 122 (1951). Speaking in favor of the Thirteenth Amendment, Senator Harlan of Iowa noted that under slavery

> [T]he conjugal relationship is abrogated. . . . Another incident is the abolition practically of parental relation, robbing the offspring of the care and attention of his parents. . . . And yet . . . this guardianship of the parent . . . must be abrogated to secure the perpetuity of slavery.

Cong. Globe, 38th Cong., 1st Sess. 1439 (1864).
Similarly, Senator Wilson of Massachusetts explained that if the Amendment were adopted, "[t]hen the sacred rights of human nature, the hallowed family relations of husband and wife, parent and child, will be protected by the guardian spirit of that law. . . ." *Id.* at 1324.

The clearest purpose of the Fourteenth Amendment was to provide former slaves access to the judicial process in order that they might vindicate commonly acknowledged rights—including the right to be free from invasion of family privacy by third-parties and to safeguard the integrity of the parent-child relation. *See* Green, *Relational Interests,* 29 Ill. L. Rev. 460 (1934); Foster, *Relational Interests in the Family,* 1962 U. Ill. L. Forum 493; Pound, *Individual Interests in the Domestic Relations,* 14 Mich. L. Rev. 177 (1916); G. W. Field, *The Legal Relations of Infants* 63-80 (1888); J. Schouler, *A Treatise on the Law of Domestic Relations* 335-353 (3d ed. 1882); J. Kent, 2 *Commentaries,* 203-206 (3d ed. 1832); W. Blackstone, *Commentaries* *452-453.

against state-imposed burdens on the right to abortion here could not be greater than its obligation to assure that the State meticulously avoid even apparent involvement in private racially discriminatory practices, a requirement this Court imposed in *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961).

In contrast to the Utah law, the statutes at issue in *Danforth* and *Bellotti,* by requiring parental consent, compelled parents to reach a conclusion whether or not to permit their minor daughter to effectuate a provisional abortion decision. Under the Missouri statute of *Danforth* the parental decision was conclusive. Under the Massachusetts statute of *Bellotti* a parental decision to permit abortion was conclusive, while a parental decision against abortion was subject to a subsequent judicial decision to permit it. In both cases the principle "that a State is responsible for the . . . act of a private party when the State, by its law, has compelled the act" applied. *Adickes* v. *Kress & Co.,* 398 U.S. 144, 170 (1970), quoted with approval in *Flagg Brothers, Inc.* v. *Brooks,* 436 U.S. 149, 164 (1978). Since both laws compelled parents to exercise effective authority over whether their daughter could obtain an abortion, subsequent parental conduct which might obstruct or unduly burden effectuation of the minor's decision was attributed to the State by this Court. *Bellotti* v. *Baird (II),* 443 U.S. at 647. (plurality opinion).

The laws at issue in *Bellotti* and *Danforth* were thus analogous to the Pennsylvania regulation, found unconstitutional in *Moose Lodge,* which required private clubs to comply with their own constitutions, even if their constitutions mandated discriminatory practices. *Moose Lodge No. 107* v. *Irvis,* 407 U.S. at 178-179. Although each club's policy of discrimination was formulated through the pri-

vate decisions of its members, the obligation the State imposed upon the clubs to comply with their own discriminatory policies necessarily implicated the State in such discriminatory practices. Similarly, the laws at issue in *Danforth* and *Bellotti*, by requiring parental consent for the minor to obtain an abortion, compelled parents to implement their own private views on abortion and effectively to apply them to their daughter. Therefore, any other subsequent conduct of parents which burdened or obstructed effectuation of the minor's abortion was imputed to the State by this Court.*

In *Flagg Brothers, Inc.* v. *Brooks*, 436 U.S. 149 (1978), this Court held that a statute which specifically authorized warehousemen to conduct sales of goods in their possession did not make their acts "state action," ruling that "[t]his Court . . . has never held that a State's acquiescence in private action converts that action into that of the State."

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* The Massachusetts law at issue in *Bellotti* not only granted parents the initial power to determine whether or not the minor should procure an abortion, but also involved parents in any judicial hearing held later to determine whether or not the parent's decision should be overruled. Insofar as the parents' views on their daughter's abortion would be heeded and enforced through the judicial hearing contemplated under the Massachusetts law—as the requirement of parental notice of the proceeding implied they would be—the State might have been implicated in any parental effort to block or burden effectuation of the abortion. *Cf. Shelley* v. *Kraemer*, 334 U.S. 1 (1948).

Under the Utah law, on the other hand, the State does not provide any enforceable means, judicial or otherwise, by which the parents may obstruct the abortion. Simply provided with the knowledge of a proposed abortion, the parents are otherwise left to their own devices. In this regard, the State involvement in parental conduct here is far less than in judicial enforcement of a trust which provided that a park be operated on a racially discriminatory basis. *Cf. Evans* v. *Abney*, 396 U.S. 435 (1970).

Id. at 164. Even implied state approval, unless the State "has put its weight on the side of the proposed practice by ordering it, does not transmute a practice . . . into 'state action.'" *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. at 437. Utah does not even *acquiese* in parental obstruction of abortion. Rather, it seeks to advance parent-child consultation on a matter of great moment to the child's life.

Thus, whatever parents may do, there is no state action obstructive of a minor's abortion under the Utah parental notice law. But even if there were, this would not warrant the conclusion that parental conduct could properly be attributed *to the statute* such that the statute could be stricken because of the prospect of such conduct.

The argument to the contrary is really based on the proposition that the State is responsible for any conduct a private party may undertake when the State releases information to him for proper and legitimate purposes. In the context of this case, the claim is that the State is responsible for the abusive conduct of parents because of the information the State gives them for the purpose of guiding and nurturing their children—and that giving such information to parents therefore is unconstitutional "state action." The adoption of this principle into state action doctrine, if applied consistently, would have absurd results.

Under *In re Gault*, 387 U.S. 1, 33-39 (1967), the State has not merely the authority but also the duty to inform parents when their children are arrested or subject to a court proceeding. It is probable that some parents, so informed, would act toward their child in a punitive manner; it is possible that they might mistreat them in ways very similar to those the Plaintiffs fear may be applied to pregnant minors. In addition, parents with strong notions of

morality might bring heavy psychological, and even physical, pressure to bear on their children to induce them not to exercise fundamental rights—for example, to confess instead of exercising the protected right against self-incrimination. Such parental actions, if attributed to the State, would clearly be unconstitutional. *Miranda* v. *Arizona,* 384 U.S. 436 (1966). Should the parents be considered agents of the State in such actions merely because they were notified by the State of their child's arrest or pending court proceeding, and should the state practice of making such notifications be declared unconstitutional?

Federal law requires that educational institutions receiving federal funds allow parents "to inspect and review the educational records of their children." 20 U.S.C. §1232g(a)(1)(A) (1977). Some parents might misuse that information through overly punitive treatment of the child; parental knowledge of bad grades might even lead to child abuse. Should a parent who abuses his or her child after receiving information required to be given him or her by the State be deemed an agent of the State, and should the federal law be declared unconstitutional?

As this Court has recently held, even when state officials paroled a prisoner with a known history as a violent criminal, the subsequent murder committed by the released prisoner could not properly be imputed to the State. *Martinez* v. *State of California,* 100 S. Ct. 553 (1980). A state decision "that has an incremental impact on the probability that death will result in any given situation . . . cannot be characterized as state action depriving a person of life just because it may set in motion a chain of events" that leads to someone's death. *Id.* at 557. The release of information to parents concerning their minor daughter's proposed abortion can hardly be said to entail any risk comparable to that associated with the release of a criminal

with a known history of violence. Yet if the State is not to be held responsible for the subsequent conduct of such a criminal—and, indeed, if it may properly render absolutely immune the officials responsible for his release, *id.* at 558—it surely cannot be held responsible for any and all parental conduct which might conceivably occur following notice to the parents of their minor daughter's proposed abortion. To paraphrase this Court, a law that may have an "incremental impact" on the probability that a minor will not procure an abortion cannot be characterized as "state action" just because, by providing the parents with knowledge of their daughter's proposed abortion, it "may set in motion a chain of events" which leads to parental obstruction of the minor's decision to abort.

II.

THE UTAH PARENTAL NOTICE STATUTE IS SUPPORTED BY SIGNIFICANT STATE INTERESTS IN PROTECTION OF PARENTAL RIGHTS AND INTERESTS IN CHILD-REARING AND IN PROTECTION OF THE INTEGRITY OF THE MINOR'S DECISION WHETHER OR NOT TO ABORT; IT RATIONALLY SERVES THOSE INTERESTS

The full Court has never explicitly stated the standard of review to be employed in assessing the constitutionality of legislation relating to minors upon an allegation that it violates their privacy rights. In *Planned Parenthood* v. *Danforth,* 428 U.S. at 75, however, the Court considered "whether there is any significant state interest . . . that is not present in the case of an adult," and upon identifying such a "suggested interest," considered whether the law at stake did in fact "serve" that interest. Citing *Danforth,* a plurality of four Justices in *Carey* v. *Population Services International,* 431 U.S. 678, 693 (1977), sug-

gested that "State restrictions inhibiting privacy rights of minors are valid only if they serve any significant state interest . . . that is not present in the case of an adult." It is evident from the opinions of the concurring Justices writing separately that they would apply, if anything, a less stringent standard.*

In any event, the Utah law rationally serves at least two significant state interests: in safeguarding the role of parents in child-rearing, and in assuring the informed and voluntary consent of the minor.

As this Court has held, the "guiding role of parents in the upbringing of their children justifies limitations on the freedoms of minors." *Bellotti* v. *Baird (II)*, 443 U.S. at 637. Parents, "who have [the] primary responsibility for children's well-being, are entitled to the support of laws designed to aid the discharge of that responsibility." *Ginsberg* v. *New York*, 390 U.S. 629, 639 (1968). Both a minor's pregnancy and her contemplation of an abortion may implicate matters of profound concern to her parents, to the minor, and to society. If the fundamental right of parents to guide and nurture their children means anything, it surely includes an interest in providing what direction and assistance they can give to their daughter in such a situation. Nothing in our tradition has ever implied that the minor may properly claim that parents must, as a matter of constitutional law, remain ignorant of the

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* "[M]easurably contributes . . . to the . . . purposes which the State advances," *id.* at 703 (White, J., concurring in part and dissenting in part); "whether the restriction rationally serves valid state interests," *id.* at 707 (Powell, J., concurring in part and concurring in the judgment). Mr. Justice Stevens, while not articulating a standard, considered the limitation on the minor there at issue "irrational and perverse," *id.* at 678 (Stevens, J., concurring in part and concurring in the judgment).

minor's perhaps otherwise secret course of sexual and reproductive conduct. Indeed, it would be fundamentally unfair to charge parents with the continued legal responsibility to control and nurture their minor children yet, at the same time, to deny them knowledge necessary to discharge that duty.* The Constitution is not engaged in a

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* It is hardly unreasonable for the State to provide parents simple *notice* prior to abortion performed on their minor daughter when

> [t]he general rule is that the consent of the parent is necessary for an operation on a child. *Zoski* v. *Gaines,* 271 Mich. 1, 260 N.W. 99 [1935]; *Moss* v. *Rishworth,* Tex. Crim. App. 222 S.W. 225 [1920]; *Rogers* v. *Sells,* 178 Okla. 103, 61 P.2d 1018 [1936]; *Browning* v. *Hoffman,* 90 W. Va. 568, 111 S.E. 492 [1922]; *Commonwealth* v. *Nickerson,* 87 Mass. (5 Allen) 518 [1862]; *Franklyn* v. *Peabody,* 249 Mich. 363, 228 N.W. 681 [1930].

Bonner v. *Moran,* 126 F.2d 121, 122 (D.C. Cir. 1941). *See also Stump* v. *Sparkman,* 435 U.S. 349, 366 (1978), (Stewart, J., dissenting).

> [U]nless there exists an emergency, which prevents any delay, or other exceptional circumstances, a surgeon who performs an operation upon a minor without the consent of his parents or guardian is guilty of a trespass and battery. This rule is not based upon the capacity of a minor to consent, so far as he is personally concerned . . . , but is based upon the right of parents whose liability for support and maintenance of their child may be greatly increased by an unfavorable result from the operational procedures upon the part of a surgeon. . . . In this respect, the law is consistent in that parental interest in and responsibility for a minor child are subject to corresponding supervision and control. And, since the parents of such a child are responsible for his nurture and training, and are liable for his maintenance and support, others will not be permitted to interfere with such relationship or with matters touching the child's personal welfare.

Lacey v. *Laird,* 166 Ohio St. 12, 19, 139 N.E.2d 25, 30 (1956).

(footnote continued)

conspiracy with the minor and her abortion service to deny parents their most fundamental interests.

Moreover, it must be presumed that the parents will act in the best interests of their daughter by providing her with support which, because of her possible vulnerability and incapacity, may be necessary for informed consent to the procedure. *See Parham* v. *J.R.*, 442 U.S. at 602. The minor is probably unaccustomed to making decisions of such import without the guidance of her parents. The facility at which she procures an abortion is often unlikely to provide her with any meaningful guidance, as Mr. Justice Stewart has noted in *Planned Parenthood* v. *Danforth*, 428 U.S. at 91 (Stewart, J., concurring). The minor is easily subject to peer pressure, the pressure of the male who impregnated her, and the suggestions of counselors or

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(footnote continued)

Utah has provided only one statutory exception to this rule, based on the State's compelling interest in the minor's health: a minor may secure treatment for venereal disease without parental consent. Utah Code Ann. §75-5-209 (1977). On the other hand, common law parental rights and responsibilities have been expanded or reinforced by statute in several ways. Under Utah law parents remain liable for the medical treatment of their minor children. Utah Code Ann. §§ 78-45-3, 4 (1977). Parents are liable for the property damage caused by their child. Utah Code Ann. §§ 78-11-20, 21 (1977). Similarly, parents of minors who shoplift are jointly and severally liable for the cost of the merchandise, court costs, and reasonable attorney fees. Utah Code Ann. § 78-11-16 (1977). Marriage for the minor under 16 years is prohibited and void without parental consent by oath. Utah Code Ann. § 30-1-2 (1977). By implication, the minor cannot donate blood without parental consent. Utah Code Ann. § 15-2-5 (1977). A minor may not be a principal in a boxing match or contest without parental consent. Utah Code Ann. § 11-5-1 (1977). A minor may not be a safety patrol without parental consent. Utah Code Ann. § 53-12-1 (1979 Supp).

physicians at the facility or elsewhere.* Thus, it is reasonable for the State to conclude that, in view of the vulnerability of the minor, some parental involvement is necessary and desirable to provide the minor with perspective in her decision-making process. The minor has a right to continue her pregnancy to childbirth "at least" as strong as her right to terminate it. *Maher* v. *Roe*, 432 U.S. 464, 472 n.7 (1977). Yet the chance that without parental involvement the minor will sacrifice her right to continued childbearing as a result of the undue influence of third-parties is at least as great as the chance that her right to abortion may be sacrificed by virtue of the limited parental involvement the Utah law provides.

If the existence of potential effects on constitutionally protected decision-making were to be held always to outweigh the significant state interest in parental guidance of children, the results would be far-reaching.

For example, as Mr. Justice Stewart has noted, the First Amendment secures for the minor the same "liberty of each man to decide for himself what he will read and to whom he will listen" as for the adult, subject only to those limitations which may be imposed because the minor may lack "that full capacity for individual choice which is the presupposition of First Amendment guarantees." *Ginsberg* v. *New York*, 390 U.S. at 650 (Stewart, J., concurring in the

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* Insofar as the minor is induced to procure abortion contrary to parental values, the law has traditionally implied that parents' rights and interests have been violated. A private party who engages the minor in sexual conduct, with or without the minor's consent, is liable for seduction for interference with family relations. See W. Prosser, *Law of Torts* 884-886 (4th ed. 1971). Utah has by statute authorized parents to sue on behalf of the minor who has been seduced, whether or not the minor is living with the parents and whether or not there is a loss of service. Utah Code Ann. § 78-11-5 (1977).

result). *See also Tinker* v. *Des Moines Independent School District,* 393 U.S. 503 (1969). Yet educational institutions customarily notify parents of both the progress and the nature of the course of study their minor child pursues. Indeed, when these institutions receive federal funds, they are required to do so by federal law. 20 U.S.C. §1232g(1)(A) (1977). The impact of such parental notice on the First Amendment right "to decide for himself what he will read and to whom he will listen" of the minor who fails parental expectations, or who might wish to adopt a course of study which varies from parental preference, is often severe. If this Court would not strike down the parental notification requirement concerning grades and subjects as a "burden" on the explicit First Amendment rights of the minor, neither should it find that the Utah parental notice law constitutes an undue burden on the effectuation of a minor's abortion decision.

The social and individual effects of the Utah law may well be subject to policy debate. The Utah legislature hoped that the law, by making possible familial consultations which might not otherwise have taken place, would enhance the quality of the minor's decision-making and provide her with much-needed perspective and emotional support. Whether such parental consultation is desirable in all cases is a matter for the legislature. As Mr. Justice Cardozo wrote for the Court in *Helvering* v. *Davis,* 301 U.S. 619, 644 (1937), "Whether wisdom or unwisdom resides in [the statute before us], it is not for us to say. The answer to such inquiries must come from [the legislature], not the Courts. Our concern here, as often, is with power, not with wisdom."

Since, in judging state laws dealing with minors, this Court has indicated they need only rationally "serve" the significant interests which justify them, they need not be drawn with such precision as to account for every circumstance that might arise. *Cf. Dandridge* v. *Williams,* 397 U.S. 471, 486-487 (1970) (applying the "rational relation-

ship'' test in a case involving equal protection analysis). Although there might be some instances in which the parents will not provide minors with supportive assistance or guidance, the conceivable presence of such isolated exceptions does not make Utah's action unreasonable.

Protection of the fundamental rights of parents and of the integrity of the minor's decision to exercise one fundamental right or the other—to continue to bear a child or to terminate pregnancy—are certainly significant state interests. If Utah wished to protect these interests at all, it is difficult to see how it could have fashioned its law differently.

One of the Plaintiff-Appellant's amici suggests a scheme whereby the minor's physician would be granted the authority to determine whether the parents should be notified or not.* But the physician is not professionally competent to make such a determination—his conclusion would have nothing to do with his technical training or expertise unless, perhaps, he were a psychiatrist. ''[T]he most significant consequences of the decision are not medical in character.'' *Planned Parenthood* v. *Danforth,* 428 U.S. at 103 (Stevens, J., concurring in part and dissenting in part).

Moreover, such a scheme would grant to a private third-party with an economic interest in performing the abortion—and thus a possible conflict of interest with the minor's best interests—the power arbitrarily to determine whether the parents would properly exercise their rights and interests. It improperly presumes that a physician who probably does not know the minor's parents and who may not even have seen the minor before the proposed abortion would be in a better position to ascertain the minor's competence or best interests than the parents, who have probably known her all her life. It must be doubted that such a

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* Brief of Coalition for the Medical Rights of Women, *et al.,* at 59-63.

law would rationally serve either the state interest in protection of parental prerogatives or the state interest in assurance of the minor's competent consent.

The presumption that parents will act in the best interests of their minor daughter fully supports the inference that the Utah law substantially relates to the interests it serves. Surely, if parents may confine a minor, perhaps for life, to a mental institution with the concurrence of a physician, *Parham* v. *J.R.*, 442 U.S. 584 (1979), providing parents with simple notice that an abortion is to be performed on their minor daughter is not unconstitutional.

CONCLUSION

The Utah parental notice statute neither represents state action which obstructs or unduly burdens effectuation of the minor's abortion, nor contravenes the minor's interest in preserving her abortion decision from "public" disclosure. It serves the State's significant interests in protection of parental child-rearing rights and in protection of the integrity of the minor's decision whether or not to abort.

WHEREFORE, your Amicus prays this Court to sustain the decision of the Supreme Court of the State of Utah, finding this law constitutional.

Respectfully submitted,

DENNIS J. HORAN
VICTOR G. ROSENBLUM
JOHN D. GORBY
PATRICK A. TRUEMAN
DOLORES V. HORAN
THOMAS J. MARZEN
230 N. Michigan, Suite 915
Chicago, IL 60601
312/263-5029
Attorneys for Americans United for Life

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5903

H. L. etc., Appellant

vs.

Scott M. Matheson, et al.,
Appellees

On Appeal from the Supreme Court
Of Utah

MOTION FOR LEAVE TO FILE A BRIEF WITH BRIEF AS AMICUS CURIAE BY THE LEGAL DEFENSE FUND FOR UNBORN CHILDREN IN SUPPORT OF THE APPELLANT

Alan Ernest
P.O. Box 2471
Washington, D.C. 20013
Counsel for Amicus

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE ON BEHALF OF THE LEGAL DEFENSE FUND FOR UNBORN CHILDREN

The Legal Defense Fund For Unborn Children is an organization whose interest is to protect the constitutional rights of unborn children.

The amicus presents legal matter to the Court which is not presented by the parties.

The amicus tenders evidence to show that Roe v Wade, 410 US 113 (1973) is based on false evidence and millions of lives have been unconstitutionally exterminated. Of course, this requires the overruling of that case.

If Roe v Wade were overruled, it would be dispositive of this case.

The amicus also adopts by reference the new evidence presented in the brief in support of the Motion To Appoint Counsel For Children Unborn And Born Alive. That evidence shows many Roe v Wade killings to be murder in the first degree.

WHEREFORE, the Court is moved to grant this motion for leave to file this amicus brief.

Alan Ernest
Counsel for Amicus

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AMICUS CURIAE BRIEF

For the 59th time, the Supreme Court is petitioned to overrule its 1973 abortion decision, Roe v Wade, 410 US 113. The grounds are set out below in the SUMMARY OF ARGUMENT.

SUMMARY OF ARGUMENT

1. The Supreme Court is petitioned to overrule Roe v Wade on the grounds that it is based on false evidence and millions of lives have been unconstitutionally exterminated. See PART I, infra pages 2-7.

2. It is also alleged that, independent of the evidence in Roe v Wade, the procedures used by the Supreme Court to effect and maintain the Roe v Wade killings so palpably violate due process of law as to leave no question that the exterminations are unconstitutional. See PART II, infra pages 8-11.

3. It is further alleged that many of the killings that the U.S. Supreme Court asserted to legalize in Roe v Wade are murder in the first degree. The evidence presented in the MOTION TO APPOINT COUNSEL FOR CHILDREN UNBORN AND BORN ALIVE, filed in this case, is incorporated herein by reference.

4. It is further alleged that the Roe v Wade killings violate federal and state positive criminal statutes. The U.S. Supreme Court is herein charged with crim-

inal falsehood and criminal extermination, including mass murder in the first degree. See PART III, infra pages 11-14.

5. It is alleged that the judges of the United States have combined to overthrow the Constitution of the United States and to establish a government by Judiciary, founded on fraud and murder. See PART IV, infra pages 15-22.

ARGUMENT

PART I
ROE v WADE IS BASED ON FALSE EVIDENCE

It is alleged that Roe v Wade, 410 US 113, is based on false evidence and millions of lives have been unconstitutionally exterminated. The documentation to prove this charge has been repeatedly submitted to the Supreme Court.

This documentation was succinctly outlined in counsel's 16th petition to overrule Roe v Wade(Unborn Child Roe v. John J. Sirica, Judge, United States District Court for the District of Columbia, (78)A-215):

"1. even the Supreme Court admitted in Roe v. Wade that if the unborn were 'a "person" within the language and meaning of the Fourteenth Amendment' then the case for abortion for convenience 'of course, collapses, for the fetus' right to life is then guaranteed specifically by the Amendment,' and

"2. the express, universal terms of the Fourteenth Amendment ('nor shall any State deprive any person of life . . . without due process of law') on their face, protect the lives of the unborn, as everyone else, and

"3. the holdings of Chief Justice John Marshall (that can be traced through the Constitution, The Federalist Papers, and The Federal Convention of 1787) show that the Supreme Court had no lawful authority to construe an exception to express, universal terms (such as 'any person') unless the Court could prove the exception to the express, universal terms beyond a reasonable doubt, and show that 'had this particular case been suggested' to the framers the 'language would have been so varied, as to exclude it,' and

"4. the Supreme Court presented false evidence to support its conclusion in Roe v Wade that 'the word "person," as used in the Fourteenth Amendment, does not include the unborn,' and but for the false evidence, there is not even a credible foundation, much less a compelling one, for denying the protection of the express, universal terms 'any person' to the lives of the unborn, and

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Summary of False Evidence

In introduction, at the time the Fourteenth Amendment was adopted in 1868, most states had already enacted positive statutes that made abortion a crime unless it were necessary to save the life of the mother. Within a few years, these criminal abortion statutes were virtually universal.

Consequently, any theory of a constitutional right to abortion on demand faced an impossible contradiction: How is it possible that the people who adopted the Fourteenth Amendment had enacted positive criminal statutes to protect unborn life, and at the

same time, without a single word of explanation, intended to imply an exception to the express, universal terms that not "any person" can be deprived of life without due process of law, and to create a constitutional right to abortion on demand?

To resolve that fatal contradiction, the Court asserted the hypothesis that when the criminal abortion laws were first enacted, the laws were not intended to protect unborn life, but rather were only intended to protect the mother. This hypothesis was falsely fabricated and used as follows:

(A.) The Supreme Court first asserted, "When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman." Roe v Wade, 35 L Ed 2d at 174. This was asserted as fact.

The only authority cited by the Supreme Court to prove this assertion of fact was a 20th century medical history book, Haagensen and Lloyd, A Hundred Years of Medicine 19(1943). But this book merely described the hazards of major surgery in general prior to Lister's discovery of antiseptics. The reference did not even mention the abortion operation.

However, the 19th century obstetric authorities throughout the Western World prove the Court's assertion of fact to be false. These 19th century obstetric authorities, based on their own experience in performing abortions, and from hundreds of cases reported from around the world, declared in their obstetric textbooks that the abortion operation, the operation of artificially evacuating the fetus from the womb, was "perfectly safe" to the mother, 2 T. Denman, M.D., An Introduction to the Practice of Midwifery 96(1802)(English physician); or "experience has proved that the dangers of the operation are reduced to a small matter," A.L.M. Velpeau, M.D., A Complete Treatise on Midwifery 530(4th American ed. 1852)(French physician); or "to the mother there is very little danger." H.L. Hodge, M.D., The Principles and Practice of Obstetrics 293(1864)(American phy-

sician). In short, the obstetric authorities prove the Supreme Court's assertion of fact to be false.

The Supreme Court never revealed the "hazardous" abortion "procedure" to which it was referring. Actually, the 19th century physicians used the ancient method: "the membranes of the ovum are punctured," which permitted "the discharge of the waters," which induced the "action of the uterus" to "come on," which resulted in the expulsion of the fetus from the womb. 2 Denman, supra, 99. One 19th century physician traced this operation back almost 2000 years.

(B.) The Supreme Court next asserted, "Abortion mortality was high." Roe v Wade, 35 L Ed 2d at 174. This is asserted as fact.

The Supreme Court asserted "Abortion mortality was high" without any authority to support it. It is a naked assertion. The 19th century obstetric authorities also prove this assertion of fact to be false.

(C.) Upon the two false assertions of fact, the Supreme Court infers that "a State's real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy." Roe v Wade, 35 L Ed 2d at 174.

(D.) From the inference that the criminal abortion laws were not intended to protect the unborn, the Court further inferred that, likewise, the framers of the Fourteenth Amendment did not intend it to protect the lives of the unborn, "that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." Roe v Wade, 35 L Ed 2d at 180. This conclusion rests entirely on inference.

This pyramid of inference is shown to rest on assertions of fact that are false.

Moreover, as independent corroboration of the purpose of the criminal abortion statutes to protect the unborn, 19th century authorities in criminal law, e.g., 2 Archbold, Archbold's Criminal Procedure, Pleading and Evidence 295(6th ed 1853); medical jurisprudence, e.g., F. Wharton and M. Stille, M.D., A Treatise on Medical Jurisprudence 339, 927(2d ed. 1860); medicine, e.g., 13 Transactions of the American Medical Association 56-58 (1860); as well as state supreme courts, e.g., State v Moore, 25 Iowa 128, 135-136(1868), did expressly affirm that these criminal abortion statutes were intended to protect the lives of the unborn.

Consequently, not only is the Supreme Court's inference about the purpose of the 19th century abortion laws shown to rest on false assertions of fact, but there is no other evidence to come to the rescue and save the Court's conclusion. The 19th century authorities prove the very contrary.

In Summary, the Supreme Court bore the burden of proving beyond a reasonable doubt that the express, universal terms of the Fourteenth Amendment, "any person," did not include the unborn. Yet, the Supreme Court did not cite one 19th century authority that expressly affirmed that the unborn were not persons within the language and meaning of the Fourteenth Amendment, or that there was a constitutional right to abortion on demand; and the Court's conclusion that the 19th century abortion laws were not intended to protect the unborn is shown to rest on false evidence. To the contrary, the 19th century authorities demonstrate that the people who adopted the Fourteenth Amendment not only intended to protect the lives of the unborn, but had already enacted criminal abortion statutes to do so in fact.

"5. the truthful history corroborates that the express, universal terms 'any person' include the unborn, as they do all categories of persons, and

more certainly than many groups. The Supreme Court included corporations and aliens as a 'person' within the language and meaning of the Fourteenth Amendment merely on the strength of the express, universal terms 'any person,' without any independent corroborating evidence whatsoever. (The unborn being the only persons ever excluded from the terms 'any person')

"In short, EXHIBIT A shows that the Supreme Court violated the very letter of the Constitution as well as its spirit, and condemned millions of victims to death whom the Constitution endeavors to preserve. . . . . (A)nd there appears to be no defense that will not amount to a claim that the Supreme Court is above the law."

PART II
THE COURT'S PROCEDURES ARE UNCONSTITUTIONAL

Completely independent of the Court's evidence, supra PART I, it is also alleged that the procedures used by the Supreme Court to effect and maintain the Roe v Wade killings are in such manifest conflict with due process of law as to leave no doubt that the killings are unconstitutional.

As counsel's 17th petition to overrule Roe v Wade pointed out (Gaetano v. Earl Silbert, United States Attorney for the District of Columbia, No. 78-427, cert. denied 58 L Ed 2d 324):

"The evidence in Roe v Wade aside, the procedures used to effect the Roe v Wade killings alone condemn the killings as illegal. The Nuremberg

court, in outlining the case against the Nazi judicial system, noted that many victims were executed after trials which 'did not approach even a semblance of fair trial':

'In many instances they were denied the right to introduce evidence, to be confronted by witnesses against them. . . . They were ... denied the right of counsel of their own choice, and occasionally denied the aid of any counsel.' [The Justice Case infra p. 19, at 1046.]

" The U.S. Supreme Court has, in broad form, used these very procedures to effect the Roe v Wade killings. For example, in Roe v Wade, the Court used evidence found by itself, which the parties had not cross examined in a judicial proceeding. The Attorney General of Georgia, a party, requested leave to cross examine the Supreme Court's evidence:

'The Court has taken judicial notice of innumerable facts . . . some which are unknown to the parties but which apparently were extricated from various sources by the Court's diligent research, which facts nevertheless should be subject to refutation and counter evidence since they form the foundation of the Court's opinion.' Petition for Rehearing at 4, Doe v Bolton, 35 L Ed 2d 201(1973).

"But the Supreme Court would not allow its evidence to be cross examined by the party. Pet. Rehearing denied, Doe v Bolton, 35 L Ed 2d 694(1973).

"And year after year, the Supreme Court has denied these applications to present evidence on behalf of the unborn victims to show that the unborn are persons whose lives are protected by the U.S. Constitution. This new evidence shows the Supreme Court's evidence to be false; and the Supreme Court will not allow the evidence to be presented. [1]

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1. In Planned Parenthood of Central

"And no abortion case before the Court appears to have had counsel to especially represent the unborn and defend their constitutional right to

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Missouri v Danforth, 49 L Ed 2d 788(1976)(the first major abortion case after Roe v Wade) eight lawyers, as counsel or amici, submitted an amicus curiae brief, outlining the evidence in PART I, supra, and alleging that "newly discovered evidence indicates that Roe v Wade rests upon factual errors that require the overruling of that case."

Since the purpose of amicus briefs is to present legal matter to the Court, not presented by the parties, so that the Court will not go wrong on vital national affairs, the Court seldom rejects amicus briefs. Stern and Gressman, Supreme Court Practice 728 (5th ed 1978). The landmark constitutional decision which applied the Fourth Amendment exclusionary rule to the States was predicated upon argument by amicus curiae, not the parties. Mapp v Ohio, 367 US 643, 646 n.3(1961). And in the Missouri abortion case it was only the amicus brief that presented the newly discovered evidence showing Roe v Wade to be based on false evidence.

But the Supreme Court would not allow this amicus brief to be filed. Motion to file by D.C. Right to Life Committee, et al., denied 46 L Ed 2d 633(1976). After refusing to allow this "newly discovered evidence," showing Roe v Wade to be based on false evidence, to be presented on behalf of the unborn, the Court proceeded to nullify parts of the Missouri abortion statute, and effectively extended the killings in the name of Roe v Wade.

And the Supreme Court either refused permission to file amicus curiae briefs, or refused to fully and fairly hear amicus curiae briefs, which presented this new evidence, in Colautti v Franklin, 58 L Ed 2d 596; Bellotti v Baird, L Ed 2d ; Anders v. Floyd, 59 L Ed 2d 442; and Ashcroft v Freiman, affd 59 L Ed 2d 630.

life. [2]

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2. The Supreme Court has repeatedly refused to allow counsel to represent children unborn or born alive in its judicial proceedings, and to defend their constitutionally protected right to life.

In Doe v Bolton, the Attorney General of Georgia requested the Court to allow "representation of a guardian ad litem for that fetal entity and for its right to develop to birth." Petition for Rehearing at 5. But the Court denied the request.

In Colautti v Franklin, 58 L Ed 596, the Court again extended the killings in the name of Roe v Wade, after refusing to allow counsel to represent the victims and present the evidence, supra PART I, to show that the victims were being unconstitutionally exterminated by false evidence. Motion denied at 57 L Ed 2d 1131.

In Anders v Floyd, 59 L Ed 2d 442, the Court again refused to allow counsel to represent the victims, and present the evidence, supra PART I, to show that the victims were being unconstitutionally exterminated by false evidence. 59 L Ed 2d 442.

In Bellotti v Baird, L Ed 2d , the Court refused to allow counsel to represent the victims and present new evidence (See MOTION TO APPOINT COUNSEL FOR CHILDREN UNBORN AND BORN ALIVE in this case) to show that the victims were being murdered. 59 L Ed 2d 451.

In Ashcroft v Freiman, 59 L Ed 2d 630, the Court affirmed an appeal after refusing to allow counsel to represent the victims and defend their constitutional right not to be murdered.

And the Supreme Court refused to allow counsel to represent the victims and defend their constitutional right not to be murdered in Baird v Sharp, cert. denied 60 L Ed 2d 1057, and Preterm v King, cert. denied 60 L Ed 2d 1057.

"In summary, without counsel representing the victims, it appears that the Supreme Court itself produced evidence to condemn the victims; denied permission to cross examine its evidence; and denied requests to present evidence on behalf of the victims, even evidence showing the Court's evidence to be false. Exterminations pursuant to these procedures cannot be pretended to be lawful."

Thus, the Court has repeatedly heard and decided abortion cases, and struck down state abortion laws, and effectively extended the killing in the name of Roe v Wade, and refused to appoint counsel to represent the victims and present new evidence, never presented by the parties, to show that the victims are being exterminated in violation of the U.S. Constitution, and positive criminal statutes, including mass murder in the first degree.

It can not be pretended that it is any longer the government of the United States- any government of Constitution and laws- wherein judges presume to decree killing to be a constitutional right and refuse to even listen to the facts.

PART III
THE CASE AGAINST THE SUPREME COURT

Counsel's 8th(Gaetano v Louis Oberdorfer, Judge, United States District Court for the District of Columbia, No. 77-1358), and each subsequent petition, specified the criminal statutes believed violated, and charged the Supreme Court with criminal falsehood and criminal extermination:

"THE CASE AGAINST THE SUPREME COURT

"The evidence appears to support the charge that some Justices of the U.S. Supreme Court have violated federal criminal statutes, such as:

"18 USC 242, Deprivation of rights under color of law,- It is a crime for government officials, acting under pretense of law, to willfully deprive persons of their rights secured by the U.S. Constitution. The documentation in EXHIBIT A, at the very least, permits reasonable people to conclude beyond a reasonable doubt that the unborn are persons whose lives are protected by the U.S. Constitution. The evidence that Justices specifically authorized killings throughout the United States, by a willfully false construction of the Constitution, would certainly permit a jury to conclude beyond a reasonable doubt that Justices, acting under pretense of law, had deprived millions of unborn persons of their right to life protected by the U.S. Constitution.

"22 D.C. Code 201, D.C. abortion statute,- The felony abortion statute only permits abortions in the District of Columbia to preserve the mother's life or health. The evidence that Justices specifically authorized non-therapeutic abortions in violation of the positive criminal statute, by a willfully false construction of the Constitution, would surely permit a jury to find beyond a reasonable doubt that Justices had aided and abetted those killings.

"22 D.C. Code 105 a, Conspiracy,- When Roe v Wade was decided, non-therapeutic abortions were illegal, not just in the District of Columbia, but generally throughout the United States. The evidence that Justices specifically authorized non-therapeutic abortions in violation of the States' positive criminal statutes, by a willfully false construction of the Constitution, would appear to permit a jury to find beyond a reasonable doubt that Justices conspired to effect those killings.

"18 USC 1503, Obstruction of justice,- It is a

crime to endeavor to obstruct or impede the due enforcement of the law of the land, even by conduct that is otherwise legal, if the motive is corrupt or dishonest. The evidence that the Supreme Court has been petitioned year after year to overrule Roe v Wade on the grounds that it is based on false evidence and millions of lives have been illegally exterminated, and year after year the Supreme Court summarily refused to even listen, would appear sufficient to permit a jury to conclude beyond a reasonable doubt that Justices had dishonestly endeavored to obstruct or impede the due enforcement of the law of the land.

"18 USC 1001, False statements,- The evidence that some Justices, within their official jurisdiction, made or adopted false statements in Roe v Wade, and repeated petitions indicated the false statements to be willful and knowing, might be sufficient to permit a jury to conclude beyond a reasonable doubt that some Justices had made false statements within 18 USC 1001.

"18 USC 371, Conspiracy,- It is not only a crime to conspire to commit any criminal offense, but also to conspire to defraud the United States by misrepresentation or the overreaching of those charged with the carrying out of the governmental intention. The evidence already mentioned would appear sufficient to permit a jury to find beyond a reasonable doubt that Justices had not only conspired to commit the above mentioned crimes, but also to defraud the United States.

"18 USC 1621, Perjury,- An oath of office to uphold the Constitution would probably not, under ordinary circumstances, support a charge of perjury. However, Chief Justice John Marshall held that for "judges" to "swear" to discharge their duties "agreeably to the constitution" and then "close their eyes on the constitution" and "condemn to death those victims whom the constitution endeavours to preserve" is worse than "solemn mockery," it is a "crime." Marbury v Madison, 1 Cranch at 179-180.

And counsel's 25th petition, and each subsequent petition, to overrule Roe v Wade presented the new evidence, adopted herein by reference, which shows many Roe v Wade killings to be murder in the first degree. The Justices who asserted to legalize those killings may now face the death penalty in very many states.

The Supreme Court has never attempted to show the new evidence to be wrong, much less to prove the charges to be false.

And failure to deny a charge can be taken as an admission that the charge is true. "Underlying the rule is the assumption that human nature prompts an innocent man to deny false accusations and consequently a failure to deny a particular accusation tends to prove belief in the truth of the accusation." McCormick On Evidence 353 (1972). "(T)he Court has consistently recognized that ... silence in the face of accusation is a relevant fact..... Silence is often evidence of the most persuasive character." Baxter v Palmigiano, 47 L Ed 2d 810, 822 (197[illegible]). And the rule is ancient. As Socrates cross-examined at his trial over 2000 years ago, "you are silent, and have nothing to say. But is this not rather disgraceful, and a very considerable proof of what I was saying?" And again, "I may assume that your silence gives consent." Apology in Plato 41, 45(Jowett transl. Classics Club 1942). See also, 4 Wigmore, Evidence, §§ 1071-1072 (Chadbourn rev. 1972).

PART IV

THE SUPREME COURT HAS OVERTHROWN THE UNITED STATES CONSTITUTION

The evidence shows that the judges of the United States have combined to overthrow the United States Constitution, and to establish a government by Judiciary, founded on fraud and murder.

A.

It can not be contested that America was founded upon the principle that government derives its "just powers from the consent of the governed." This was adopted by the Continental Congress in the Declaration of Independence. While the Declaration may not be law in itself, it provides definitions by which the law is to be understood. Gulf, Colo. and S.Fe Ry v Ellis, 165 US 150, 159-160(1896).

The first sentence of the U.S. Constitution sets out this mother principle of democracies: "All legislative powers herein granted shall be vested in a Congress of the United States." Congress is elected by the people at regular elections, and thus, its laws are derived from the consent of the governed.

The Constitution itself was adopted by the people in convention. The Constitution is thus derived from the consent of the gov-

erned. And Article V of the Constitution provides the means for amending the Constitution, which likewise makes amendments be derived from the consent of the governed.

B.

Under the U.S. Constitution's Article III, the federal judiciary is not elected by the people, and holds office during good behavior, in effect, for life.

The Constitution gives the judges no power to make laws. The lawmaking power, as admitted by the Supreme Court, is the power to make new rules for the future. Ross v Oregon, 227 US 150, 161 (1913).

While the judicial power does not admit to lawmaking, it has been decided that it does admit to determining the meaning of statutes, and the U.S. Constitution. Marbury v Madison, 1 Cranch 137(1803). But the Supreme Court has no power to make new laws under the guise of construction. Pillsbury v United Engineering, 342 US 197, 199.

The rules used by the courts to construe the meaning of the laws are founded in the principle that laws are derived from the consent of the governed. The purpose of construction is to determine the intent of the lawmaker.

Chief Justice John Marshall recognized this "consent of the governed" as the foundation of the rules that the courts must apply in construing the Constitution.

FIRST: The Constitution must be given the meaning "contemplated by its framers."

Ogden v Sanders, 12 Wheat. 212, 332(1827) (dissenting opinion).

SECOND: "(I)n no doubtful case would it pronounce a legislative act to be contrary to constitution." Dartmouth College v Woodward, 4 Wheat. 518 625(1819).

The foundation under these two rules is too compelling to admit any doubt as to the truth of the two rules.

Since the legitimacy of the Constitution is derived from the consent of the governed, any true construction must give the Constitution the meaning intended by the people who framed and adopted it. The central question is: To what have the people consented. Any policy of construction that disregards the consent of the governed can not be lawful. And to what the people have consented is susceptible to proof by evidence which can be independently verified. Thus the security of a written Constitution.

The second rule is a necessary corollary of the first. The right of the people to govern themselves being so paramount, it takes careful and clear evidence to warrant a conclusion that, in the U.S. Constituiton, the people intended to withdraw from themselves the power to make their own laws on that subject. If, after review of the words of the Constitution, and the historical evidence concerning the meaning of those words, a reasonable doubt remains as to whether the makers of the Constitution intended to prohibit such a law, then

the law must stand as valid. The opinions of unelected officials holding office for life are not to be substituted for the judgments of the peoples' elected representatives unless the conflict between the law and the Constitution is clear.

The decisions of Chief Justice John Marshall are submitted as a faithful execution of these two principles of construction.

C.

In his Farewell Address, Washington warned that the customary means of overthrowing constitutions was by usurpation:

> If in the opinion of the People, the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. 35 The Writings of George Washington 229(Fitzpatrick ed. 1949).

D.

The world does not want for examples of democratic constitutions overthrown by the process of usurpation.

Prior to World War II, the German Constitution was thought to be a model of democracy and freedom, "the most liberal and democratic document of its kind the twentieth century had seen," which declared "Political power emanates from the people." W.L. Shirer, The Rise and Fall of the Third Reich

88-89(Fawcett Crest paperback 1969). Hitler came to power "within the terms of the constitution." Id., at 255.

Thereafter, by usurpation, Hitler became the "supreme judge" of Germany. The Justice Case, 3 Trials of War Criminals before the Nuernberg Military Tribunals 1011 (1951). The decrees of this "supreme judge" were obeyed as law. The "supreme judge" presumed to decree murder to be lawful. And this "supreme judge" was unquestioningly obeyed by the Nazi judges.

At Nuremberg, the Nazi judges claimed the defense that they could not be held accountable for their crimes against humanity, including "extermination," because they were bound by the "decrees" of the "supreme judge" of Germany. The Justice Case, supra, 983-85,1010-1014. The Nuremberg court rejected that defense with the observation,"The dagger of the assassin was concealed beneath the robe of the jurist." The Justice Case, supra, at 985.

Never formally repealed, the Constitution was overthrown by usurpation.

E.

The evidence shows that the judiciary of the United States has set upon a course of usurpation astonishingly similar to that traveled by the Nazi judicial system.

The judges of the United States came to power within the terms of the Constitution. The evidence shows that the judges routinely, as a matter of policy, defy the consent

of the governed, and effectively assert their will to be law. See, R. Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment(1977). This book sets out evidence to show that the Supreme Court has generally construed the Fourteenth Amendment in defiance of the intent of its framers. Berger concludes, "Such conduct impels one to conclude that the Justices are become a law unto themselves." Id., at 408.

The evidence shows that the Supreme Court uses false evidence to defy the intent of the framers. Supra, PART I.

The evidence shows that the Supreme Court has presumed to decree murder to be a constitutional right. See MOTION TO APPOINT COUNSEL FOR CHILDREN UNBORN AND BORN ALIVE incorporated herein by reference.

The evidence shows that when it comes to constitutional questions, truth has nothing to do with the federal courts: the will of the judge has become the law.

The evidence, supra pages 7-11, shows that the Supreme Court , in broad form, has used the same procedures to effect and maintain the Roe v Wade killings as the Nazi judges used to condemn their victims:

> In many instances they were denied the right to introduce evidence, to be confronted by witnesses against them, or to present witnesses in their own behalf. They were... denied the right of counsel of their own choice, and occasionally denied the aid of any counsel. The Justice Case, supra, 1046.

The evidence shows that, through Roe v

Wade, the Supreme Court has effectively asserted a second method for the government to condemn persons to death.

The first, set out in the Constitution, is by conviction by an impartial jury for violation of express laws enacted by the people and applicable to all in the state; with right of representation of counsel; and right to confront the accusing evidence and cross-examine it; and right to present evidence on behalf of the accused; and right to be acquitted unless found guilty beyond a reasonable doubt; and provision to stop execution if new evidence is discovered.

The second, set out in Roe v Wade, is for a Tribunal holding office for life(without assistance of counsel to defend the victims) to rule the victims out of the human race as inferiors, in violation of the very letter and spirit of the Constitution.

The evidence, supra, shows that the Supreme Court decreed murder to be a constitutional right, and there does not appear to be any defense that will not amount to a claim that the Supreme Court is above the law,- as Hitler was to Germany so the Supreme Court is to America.

The evidence shows that the Supreme Court is being unquestioningly obeyed by the federal judiciary. See counsel's 34th & 35th petitions to overrule Roe v Wade, Unborn Child Roe v. United States Court of Appeals for the District of Columbia Circuit, No. 79-166; and Unborn Child Roe v.

John J, Sirica, Judge, United States District Court for the District of Columbia, No. 79-188. Those courts have effectively ruled that they were bound by Roe v Wade regardless of any claim that it was wrongly decided. The federal judiciary is willing to enforce, permit, and omit to stop killings that violate the express terms of the U.S. Constitution, and positive criminal statutes, including mass murder in the first degree, without asking even a single question, much less demanding any answers.

The evidence shows that in the courts of the United States, the will of the judge has replaced the consent of the governed as the basis of law. By any definition, this is the overthrow of the United States Constitution.

If it be true, as Chief Justice John Marshall once held in Marbury v Madison, 1 Cranch 137, 163, 176, 178, that "government of laws, and not of men," founded in a "written constitution" deriving its just power from the "supreme" "authority" of "the people" is "the greatest improvement on political institutions," then the overthrow of that government of laws by lawless federal judges may be the most heinous crime in the history of political institutions.

Furthermore, the Declaration of Independence is perverted by the judges to effectively read that "all Men are created equal-equal,- except those created to die for the convenience of others."

CONCLUSION

If it be true, as Jefferson once wrote, that America is an "experiment" to establish that "man may be governed by reason and truth," and that "truth and reason will eternally prevail, however in times and places they may be overbourne for a while by violence," then the facts showing the consent of the governed will ultimately prevail.

And Chief Jusitce John Marshall held, for federal judges to "swear" to discharge their duties "agreeably to the constitution tion," and then "close their eyes on the constitution" and "condemn to death those victims whom the constitution endeavors to preserve," is worse than "solemn mockery," it is a "crime." Marbury v Madison, supra, 179-180. The criminal law will not permit the "dagger of the assassin" to be "concealed beneath the robe of the jurist."

If the United States were being ruled over by a Tribunal of murderers holding office for life, and being blindly obeyed by all federal judges who violate the express words of the Constitution and positive criminal statutes, including mass murder in the first degree, without question, then surely it would be a fraud without parallel in the legal history of the world, and tantamount to the overthrow of the Constitution of the United States.

Alan Ernest
Counsel

MOTION FILED
APR 5 1980

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5903

H. L. etc., Appellant

vs.

Scott M. Matheson, et al.,
Appellees

On Appeal from the Supreme Court
Of Utah

MOTION TO APPOINT COUNSEL FOR CHILDREN UNBORN AND BORN ALIVE

Alan Ernest
P.O. Box 2471
Washington, D.C. 20013

Counsel for Movant

MOTION FOR APPOINTMENT OF ALAN ERNEST AS COUNSEL FOR CHILDREN UNBORN AND BORN ALIVE

The Court is moved to appoint Alan Ernest as counsel, or guardian ad litem, to represent the children unborn and born alive in this case.

Alan Ernest is a lawyer in the District of Columbia, and a member of the bar of this Court. His interest is to defend the constitutional rights of children unborn and born alive.

Counsel will present new evidence, unquestionably unparalleled in the legal history of this nation, not presented by the parties. This new evidence is outlined in the attached brief in support of this motion.

The new evidence shows that many of the killings that Roe v Wade asserted to legalize were murder in 1868 and punishable by the death sentence. Obviously, a child whose life was protected by the murder laws in 1868 is a person within the language and meaning of the Fourteenth Amendment. Absent a constitutional amendment, the killings are still murder. Justices who presumed to permit these killings may be subject to the death penalty in very many states.

The counsel also adopts by reference the evidence submitted in the amicus brief by the LEGAL DEFENSE FUND FOR UNBORN CHILDREN. That evidence shows Roe v Wade to be based on false evidence and millions of lives to be unconstitutionally exterminated.

WHEREFORE, the Court is moved to appoint Alan Ernest to be counsel to defend the children unborn and born alive.

Alan Ernest
Counsel

BRIEF

SUMMARY OF ARGUMENT

MANY ROE v WADE KILLINGS ARE MURDER

The evidence will show that many of the killings permitted by Roe v Wade, 410 US 113(1973) were murder in 1868. Since the killings were murder in 1868, then absent a constitutional amendment, the killings are still murder, and Roe v Wade is no law at all.

ARGUMENT

1. Introduction to Evidence

The evidence presented herein will show that, at the time the Fourteenth Amendment was adopted in 1868, the unlawful killing, with malice aforethought, of a child born alive was murder. Killings of children born alive were not treated as a special category, as was abortion.

It is thus absolutely indispensable to examine what "born alive" meant in 1868. It is obvious that, if the life of a child born alive was protected by the murder laws in 1868, then it is a person within the language and meaning of the Fourteenth Amendment.

The evidence shows that in 1868, born alive did not mean natural birth after nine full months gestation; nor did it mean birth after viability ("that is, potentially able to live outside the mother's womb, albeit with artificial aid." Roe v Wade, 35 L Ed 2d at 181). If abortion resulted in a live but unviable child that died as a consequence of its not being able to survive outside the womb, it was murder and punishable by the death penality.

The evidence shows that the hysterotomy is a common method of performing abortions under Roe v Wade. This is essentially a Caesarean, in which a live but unviable child is removed from the womb and left to die. The legal authorities show that in 1868, such a killing was murder and punishable by the death sentence.

In summary, what was murder in 1868, can not now be decreed a constitutional right. Without an amendment to the Constitution, the killings must still be murder, and the Justices who permitted these killings may be guilty of mass murder in the first degree. This is still punishable by the death sentence in many states.

2. The English Law

The English law, as reflected in the writings of Coke(3 Inst. 50), Hawkins(1 Hawkins ch.13, s. 16) and Blackstone (4 Bl. Com. 198) defined the felonious killing of a child "born alive" as murder, even if the child received the fatal wound in the womb.

These authorities were followed by the English courts in permitting prosecutions of the killing of children born alive as murder. Rex v Senior, 1 Moody CC 346(1832); Reg. v Trilloe, 174 Eng. Rep. 674(1842); Reg. v West, 2 C & K 784(1848).

Most critically, in the English law, a child did not have to be viable to be born alive. In 1848 the leading case of Regina v West, 2 C & K 784, was decided. The indictment for murder alleged that the defendant had inserted a "certain pin" "upward into the womb" of a pregnant woman for the purpose of producing the abortion of a "quick" child; and that this resulted in the child being "prematurely born and brought forth alive from and out of the womb." Id., 784-85. The child died shortly thereafter. A

"medical witness" had testified that:

"(I)t was a healthy child; but that, being born at that period of gestation, it was impossible that it could live any considerable length of time separated from the womb of the mother. It was incapable of maintaining a separate and independent existence." Id., at 786.

The judge, relying on Coke and Blackstone, instructed the jury:

"The prisoner is charged with murder; and the means stated are, that the prisoner caused the premature delivery of the witness Hensen, by using some instrument for the purpose of procuring abortion; and that the child so prematurely born was, in consequence of its premature birth, so weak that it died. .... I am of opinion (and I direct you in point of law), that if a person intending to procure abortion does an act which causes a child to be born so much earlier than the natural time, that it is born in a state much less capable of living, and afterwards dies in consequence of its exposure to the external world, the person who by her misconduct so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder." Id., at 788.

The case of Regina v West, supra, was presented by the leading English writers as the correct statement of the law of murder. See, e.g., 1 J.F. Archbold, A Complete Treatise on Criminal Procedure, Pleading and Evidence 783 (Waterman Am. ed. 7th ed. 1860); 1 W.O. Russell, A Treatise on Crimes and Misdemeanors 671-72 (4th ed. 1865); A.S. Taylor, A Manual of Medical Jurisprudence 516 (Penrose Am. ed. 6th ed 1866). Consequently, the evidence shows that in the English common law, the abortion of a quick but unviable child that resulted in the child being born alive so prematurely that its death was caused by its inability to survive outside the womb, was murder.

3. The American Law Of Murder In 1868

The English common law of murder of children born alive is significant since American courts used the English common law to construe their murder statutes. Clarke v State, 117 Ala 1(1898); Hamilton v United States, 26 App. D.C. 382(1905).

American courts cited Coke, Hawkins, Blackstone, and the English court decisions, as authoritative precedents on the law of homicide of children born alive. See, e.g., Clarke v State, 117 Ala. 1(1898); State v Winthrop, 43 Iowa 519 (1876). By 1868, leading American legal authorities had specifically cited Regina v West, supra, as the correct law of murder of a child born alive. (As already noted, that case held that if a criminal abortion resulted in the premature delivery of a quick but unviable child that died after delivery as a consequence of its being so prematurely delivered that it could not survive outside the womb, it was murder.) See, e.g., F. Wharton, A Treatise on the Law Homicide in the United States 96-97(1855). By 1868, this appears to be the uncontradicted view.

Consequently, the evidence shows that the life of a quick but unviable child born alive was protected by the murder laws in 1868.

4. The Law Of Murder In 1868 And The Fourteenth Amendment

Since the evidence shows that the life of a quick but unviable child was protected by the murder laws in 1868, the evidence likewise establishes that the child so born alive is a person within the language and meaning of the Fourteenth Amendment.

By seizing upon viability, Roe v Wade permits the killings of quick but unviable children born alive. The Supreme Court presumed to decree the killing of these children to be a constitutional

right without any examination whatsoever to see if these children were persons within the language and meaning of the Fourteenth Amendment. It is a naked decree without any investigation into the law of murder of children born alive.

This raises the question,- Does the Supreme Court have the Hitler-like power to decree murder to be a constitutional right? If invalids were protected by the murder laws in 1868, can the Supreme Court, without evidence or investigation, decree a constitutional right to kill invalids? If Jews were protected by the murder laws in 1868, can the Supreme Court decree, without evidence or investigation, a constitutional right to kill Jews? If newspaper editors were protected by the murder laws in 1868, can the Supreme Court, without evidence or investigation, decree a constitutional right to kill newspaper editors?

No doubt the Supreme Court bears the burden of proving, by evidence so conclusive that it will not admit of a rational doubt, that it possesses the power to decree murder to be a constitutional right.

5. The Hysterotomy Abortion Under Roe v Wade

A common way to perform abortions under Roe v Wade is by hysterotomy. See, e.g., Commonwealth v. Edelin, 359 NE 2d 4 (Mass. 1976). A hysterotomy is essentially a Caesarean, in which a live but unviable child is removed from the womb and left to die. See, 1 Hearings Before The Subcommittee On Civil And Constitutional Rights Of The Committee Of The Judiciary, House of Representatives On Proposed Constitutional Amendments on Abortion 397(GPO 1976).

As established by medical testimony during the 1976 House Abortion Hearings, "With few exceptions, babies aborted by this method will all move, will all breathe, and some will cry. . . .Almost allwere born alive." Id., at 397.

Consequently, by definition, in 1868, these hysterotomy abortions could have been prosecuted as murder.

6. ROE v WADE AND MISTAKE OF LAW

The Supreme Court itself has recognized that constitutional provisions against ex post facto laws do not apply to judicial decisions. Ross v Oregon, 227 US 150(1913). Consequently, if Roe v Wade is a mistake of law, then mass murder is being perpetrated in America. The Roe v Wade hysterotomy killings, by definition under the common law and thus constitutional law, violate the positive criminal murder statutes throughout the United States.

The killings of children born alive have been prosecuted as murder in the first degree, Comm. v Harmon, 4 Barr. 269(Pa 1846)(child thrown in creek); or murder in the second degree, Clarke v State, 117 Ala. 1 (1898)(wife beaten, child die from injuries) or manslaughter, People v Chavez, 77 Cal. App. 2d 621(1947)(child neglected),- according to the facts of the particular case, as in any other homicide.

In connection with these judicial killings, it is relevant to note that the Supreme Court decreed murder to be a constitutional right without any examination whatsoever of the law of murder of children born alive. And as Abraham Lincoln noted, "(I)t is an established maxim in morals that he who makes an assertion without knowing whether it is true or false, is guilty of falsehood; and the accidental truth of the assertion, does not justify or excuse him." 1 The Collected Works of Abraham Lincoln 384 (Basler ed. 1953). Since Lincoln's day, this "maxim in morals" has also been a textbook definition of perjury. See, e.g., 3 Wharton's Criminal Law and Procedure, Sec. 1308, p. 673(12th ed 1957).

Consequently, rational people are entitled to believe, and a jury may be permitted to find, that the process by which the Supreme Court decreed

murder to be a constitutional right is perjury or criminal fraud. It seems reasonable that such judicial killings, after such prolonged deliberation and adherence, could be prosecuted as murder in the first degree. Many states still punish mass murder in the first degree with the death sentence.

It may be that the judges responsible for the judicial killings did not believe that they were breaking the law. But as Mr. Justice Oliver Wendell Holmes once wrote, "Ignorance of the law is no excuse for breaking it." "It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but.. ...the lawmaker has determined to make men know and obey." Holmes, The Common Law 41(Howe ed 1963).

It now full well appears that the Justices of the Supreme Court of the United States have presumed to decree murder to be a constitutional right, without any evidence or examination whatsoever, with the death penalty the possible consequence of their decision being a mistake of law.

It now appears that, unless the Supreme Court can prove by evidence, beyond a doubt based on reason, that it has the Hitler-like power to decree mass murder to be a constitutional right, then Roe v Wade is just such a mistake of law.

CONCLUSION

Is government of laws founded upon evidence, or the mere naked decrees of men holding office for life?

The evidence proffered herein would appear sufficient to permit reasonable people to conclude beyond a reasonable doubt that the Supreme Court of the United States has committed mass murder in the first degree. The evidence would appear sufficient for reasonable people to conclude that, upon a scale never seen before in the peacetime history

of the world, "The dagger of the assassin was concealed beneath the robe of the jurist." The Justice Case, 3 Trials of War Criminals Before The Nuernberg Military Tribunals 985(GPO 1951).

If the United States were being ruled over by a Tribunal of Murderers, holding office for life, nakedly decreeing mass murder to be a constitutional right, in open defiance of the evidence, and presuming to be blindly obeyed by all courts, executives, legislatures, and people whatever without question, regardless of the evidence, then surely it would be the most astounding event in the legal history of the human race.

Alan Ernest
Counsel

Supreme Court, U. S.
FILED
MAY 8 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5903

H. L. etc., Appellant

vs.

Scott M. Matheson, et al.,
Appellees

On The Motion For Appointment Of
Alan Ernest As Counsel, etc.,

PETITION FOR REHEARING

Alan Ernest
P.O. Box 2471
Washington, D.C. 20013

Counsel for Petitioner

PETITION FOR REHEARING

The petitioner respectfully moves the Court to vacate its denial of the MOTION FOR APPOINTMENT OF ALAN ERNEST AS COUNSEL FOR CHILDREN UNBORN AND BORN ALIVE entered April 14, 1980, and to grant the motion for the following reasons:

1. The victims being killed are not especially represented by counsel.

2. The movant has presented new evidence, not presented by the parties, to show that many of the killings that the Court asserted to legalize in its 1973 abortion decision, Roe v Wade, 410 US 113, are murder, and also violate the United States Constitution. This new evidence is manifestly unparalleled in the legal history of the United States.

3. The movant also, by incorporation by reference, presented new evidence, not presented by the parties, to show that Roe v Wade is based on false evidence. This evidence shows the victims being exterminated in violation of the United States Constitution and positive criminal statutes.

4. It can not be pretended that it is any longer the government of the United States - any government of Constitution and laws - wherein judges condemn millions of victims to death, and then refuse to allow counsel to represent the victims; and refuse to allow the evidence that it used to condemn the victims to death to be cross-examined; and refuse to allow new

evidence to be presented on behalf of the victims to show that they are being exterminated in violation of the United States Constitution and positive criminal statutes.

Wherein petitioner prays that the Court will vacate its order, and grant the motion to appoint counsel for the victims.

Alan Ernest
Counsel for Petitioner

CERTIFICATE OF COUNSEL

I hereby certify that this petition for rehearing is presented in good faith and not for delay.

Alan Ernest
Counsel for Petitioner